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Issue date: 12Sep2001

In the matter of
Joseph Townsend
Claimant

v. Case No. 2000 LHC 3224

Stevens Shipping and Terminal
Employer

and

Director, Office of Workers' Compensation Programs
Party in Interest

DECISION AND ORDER

This matter arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the "Longshore Act" or "Act"), as amended, 33 U.S.C. §§§§ 901-950. The Claimant is represented by Allison White Forsyth, Esquire, Neptune Beach, Florida. The Employer/Carrier is represented by Mary Nelson Morgan, Esquire, Cole, Stone, Stoudemire, Morgan & Dore, Jacksonville, Florida. Also participating was Philip Giannikas, Esquire, Department of Labor, Nashville, Tennessee.

At hearing, May 15, 2001, Claimant*s Exhibits 1-22 (hereinafter "CX" 1- CX 22) were introduced and accepted into evidence. The Claimant testified. Live testimony was also presented on behalf of Claimant by Gilbert Spruance, a Vocational Expert. Live testimony was presented on behalf of the Employer by Jerry Albert, a Vocational Expert and James Spivey, Personnel Director at North Florida Shipyards, inc. The Employer*s Exhibits 1-24 (hereinafter "EX" 1 to EX 24) were introduced and after hearing objections by Claimant*s counsel to Exhibits EX-7 through EX 20, those Exhibits were accepted into evidence with the objections noted. After the hearing, the record remained open to provide the Employer/Carrier to take Dr. Hussain* s deposition. It also must be noted that during the course of the proceedings, objection was made to Employer/Carrier's alleged discovery of another job opportunity (Transcript, hereafter "Tr"., 9, 14-15). The testimony and the post hearing deposition were both admitted. That deposition was completed on May 24, 2001, and transcripts were received by both parties. Therefore, it is admitted into evidence as Exhibit EX 25. Both parties submitted Pre-hearing reports, marked Exhibit "ALJ" 1 and ALJ 2, respectively, and admitted into the record. Both parties submitted briefs, marked "CB" and "EB", which are also admitted, post hearing, made part of the record, along with the hearing transcript.

Issues

On June 24, 1994, the Claimant was injured in a compensable accident when he sustained a crush injury with multiple fractures to his right hand. The Claimant raised the following issues:

1. Permanent total disability;

2. Disfigurement;
3. Scheduled award; and
4. Authorization of Viagra.

The Employer responded to the Claimant's claims as follows:

1. The Claimant is not permanently and totally disabled. He is limited to a scheduled award for permanent partial disability to his right hand as the Employer has shown the availability of alternative employment.
2. There is no evidence to support a separate award for disfigurement under the Act, as there is no evidence that the appearance of the Claimant's hand injury was any greater deterrent to the Claimant's ability to return to work than encompassed in the scheduled award for permanent partial disability.
3. The scheduled injury was compensated based on the well-reasoned opinion of Dr. Glassman. There was no conflict among the treating physicians regarding the disability rating and all physicians defer to Dr. Glassman for his opinion.
4. The authorization of Viagra was denied due to the inconsistent opinions regarding the use of Prozac, which presumably necessitated the use of the Viagra, as well as the extent to which the Viagra was being demanded by the Claimant.

Although the Employer Carrier had requested relief under 8(f) of the Act, Post hearing the Claim was withdrawn (EB).

Stipulations

The parties stipulate to the following:

- The date of injury is June 24, 1994 (Tr., 36;ALJ1; ALJ 2).
- The injury occurred within the course and scope of employment. (Tr., 36).
- The claim was filed in timely fashion. (Id., 36).
- The Employer is properly named (Id.).
- The date of injury was the last day of work (Id.).
- The amount of average weekly wage is agreed upon (Id.).
- The amount of the compensation rate is agreed upon (Id.).
- All payments have been timely made (Id.).
- All medical treatment has been authorized and medical benefits have been paid

After a review of all of the evidence I find that the matters set forth above are substantiated by the record.

Facts

Mr. Townsend was a "lasher" on Blount Island, Florida. According to the Claimant, his job was to open containers so that they could be unloaded by other employees (Tr., 51). On the date of accident, the contents of a container he was attempting to open shifted, crushing the Claimant's right hand (Id, 52). According to the Claimant, he shouted, "Bossman, I'm hurt." and according to the testimony, he "Felt like somebody shot me from here to Texas." (Id.) The Claimant testified that the force of the impact caused his glove to go entirely through his right, dominant hand and protruded from the opposite side. (Id., 52-53). He was first taken to the company office, then by ambulance to St. Luke's Hospital.

By arrival, he was in shock (Id., 55). According to the testimony, he had a vision that his body has left the stretcher and had risen to the top of the ambulance. "I seen myself dying."(Id., 54).

The emergency physician was Mary Schmieder, D.O. (CX 1, 2). But he was seen that day by Dean Glassman, M.D., a hand surgeon, who operated on the hand on June 25 (CX 1, 5-6) He remained at St. Luke's until June 29 (Id., 7), but was later taken to Baptist Hospital. (CX 2; Tr, 56).

According to the Claimant, his condition was life threatening (Id., 26). He testified that he spent 20 days in the hospital. Eventually he has undergone five surgical procedures to the hand (Id., 27). As of the date of hearing, he testified that he is in pay status for permanent partial disability (Id., 35).

Claimant is 50 years old (D.O.B. August 15, 1950). He dropped out of the ninth grade and has obtained no further education. The Claimant was held back in school "About once or twice," because he was not progressing. According to the testimony, he can't read or write (Id., 40). Although he has a driver's licence, he did not obtain one until he was age twenty five or twenty six. He could not pass a written test to get the license, so an oral version was administered. He also alleged that he has limited math skills. This may be the reason that the Claimant doesn't have a checking account (Id., 41-42).

Mr. Townsend joined the merchant marines at age eighteen. He was assigned to the steward department. Originally he was a messman, but eventually became a cook (Id., 42-44). According to the Claimant, he had to do heavy lifting of items such as one hundred pound slabs of beef. He had to bring the food in bulk into the cooking area. Eventually, Mr. Townsend became the head cook (Id., 44-46). He testified that he learned the job by rote as he repeated the same weekly menu for the entire eighteen years (Id., 46). He left that position in 1987, as he began to have marital problems while he was at sea, so he took a job that did not require him to be away from home most of the time. As a longshoreman, he testified that he tried to do welding, but he could not learn how to do it (Id., 49).

After he was injured, he moved into his mother's house because he needed someone to take care of him. According to the Claimant, she took care of everything. He alleges that he could not learn to use the left hand as a dominant one. His mother had to bathe him. He remained in his mother's home about four years; he left when he realized that that he had come between his mother and stepfather and that was the cause of friction between them. Since then, has lived in three other places (Id., 57-58).

According to the Claimant, he has severe pain in the right hand. The palm is sensitive. Two middle fingers of the right hand had been crushed. The arteries and veins were cut and stripped and later sewn back. (Id., 58-59). He described burning pain. He also related that at times, he has a sensation when it feels frozen; however, intermittently, it is throbbing with pain. Sometimes it "start thumping". Id. The thumb and small finger were not crushed and are not painful (Id., 60).

Dr. Glassman sent him to hand therapy. At one time he was offered the option of having some of his toes transplanted to the hand, but he declined. He also declined an amputation. According to the

Claimant, he determined to live with the crushed fingers. On a pain scale from one to ten, he alleges that the pain is usually an eight in intensity. According to the Claimant, he is in pain all day, every day (Id., 62). He can not place any pressure on the palm of the hand, without severe pain. (Id., 120). The pain has caused him to seek emergency care at a hospital about three or four times (Id., 62). The Claimant takes Lorcet four times per day, and Celebrex as needed. As related, the medication does help the pain, but it causes him to be drowsy, and the mouth becomes dry. "I go to sleep all the time." (Id., 67). The Claimant alleges that he can not do anything due to the hand pain (Id.). He has "good and bad days" (Id., 75). He testified that he had to have a shot to be able to come to the hearing (Id., 77). The Claimant also alleges that had been at the emergency room the night before the hearing and had no sleep (Id., 121). He also said that he must cover the hand with a pillow at night to avoid sharp pains (Id., 120). He related that sometimes he gets shooting "fire-like pain". It also has a tendency to "freeze up, " become inflexible (Id., 120).

In a deposition given December 4, 2000, the Claimant had alleged that he could not use the hand at all, and could not even pick up a piece of paper (Id., 127-129). He admitted that in the surveillance video, he is seen picking up items with the right hand. He admitted that he was seen opening a car door with the right hand. He also admitted that although he testified he could not drive on Interstate Highway I-95 due to fear of large tractor trailer truck rigs, he is seen on the video driving on I-95. (Id., 132-134).

The Claimant says that he "misses being happy". Id., 85. The Claimant alleges that as a result of his depression, he has an inability to get along with other people (Id., 77-78). He related that he has a poor relationship with children because he is frustrated that he can't play with them. He is also frustrated by a loss of former athletic prowess. He alleges an inability to get along with women. "Every time I be around women, I just freeze up.... I need to hide my hand all the time...." Id., 81. He said that he suffers from constant embarrassment from his condition. He doesn't go out due to the embarrassment. He alleges that he has cut himself from his friends and family. At first he was prescribed Paxil for these problems. Eventually Prozac was more effective that other medications, because it generates fewer side effects (Id., 79- 82).

Although he improved on Prozac to the point where he began to have a relationship with a woman, he lost his sexual capacity. He testified that Viagra is effective in treating this impotence (Id., 83). However, he was denied Viagra by the Employer.

He was given therapy for his emotional problems by Dr. Beth Shadden. He now is in treatment with Dr. Wikstrom, a psychiatrist (Id., 88). According to the Claimant, he has been suicidal and perhaps homicidal (Id., 90).

The Claimant was awarded Social Security Disability benefits for himself and his children.

When asked about the function of the hand, the Claimant testified that he has the capacity to grip a coffee cup, because he can use his thumb and small finger to do it. The Employer provided the

Claimant with utensils, such as a round knife, and a left handed vacuum to help him adapt to the use of the left hand. He testified that he can drive and run some errands. He was directed to a surveillance video that he was shown; according to the Claimant, he can not use the right hand to drive, and when he was in surveillance, alleges that he drove using only the left hand (Id., 126-127).

He related that after he was determined to have reached maximum medical impairment, in 1997, he had tried to find jobs. Some were in fast food restaurants, because he thought he might be able to flip burgers with the off hand. However, as soon as he presented himself, his right hand was visible, employers would shy away. "They'd say...I see why you don't shake hands." He was rejected every time he sought employment (Id., 92- 94).

He also applied for a job at Central and All Right Parking, through an Employer job survey, but was not called for a job. According to the Claimant, he checked back on all the jobs he applied for. He was sent to I-Tech, but when he got there, he found that it was a skilled job, although it was supposed to be an assembly position, he wound up applying for a janitor's job. He also applied at Goodwill, but none of the jobs were appropriate for him (Id., 95-100). According to the Claimant, he was taken to Goodwill by the Employer's vocational witness, Mr. Albert. Mr. Albert also took him to the Salvation Army, on a very hot day. Although he applied there also, he never heard from them. He was also sent to Target, and to a strip bar by the Employer to apply as a bouncer and ticket taker. "[T]he people looked at me like I was crazy...." Id., 102-104. The Claimant stated that he is still looking for work, and will attend a job fair that Goodwill is sponsoring (Id., 100). He said that he is willing to try to work, but "most people don't want you working around nobody if you don't have your health." Id., 121.

He also applied for a job as a badge checker at North Florida Shipyards. It was the same weekend that he had the flu (Id., 104). He went to the site on April 30, 2001. On the same date, he was also scheduled for a doctor's appointment with Dr. Hussain. Eventually, the Claimant met the person who was in charge of hiring, who gave the Claimant an application. The Claimant's girlfriend filled it out for him. Meanwhile, according to the testimony, several other people came to the same location, looking for jobs, but were told in the Claimant's presence that no jobs were available. The Claimant says that he was told that he'd have to stop employees to check bags and clothing to see whether company property was being taken. He also alleges that he would be required to walk a perimeter of the company with a flashlight to check for suspiciousness. He took the drug test to get the job. He was supposed to return at 8:30 a. m. the following morning. But on that morning, the Claimant was too sick with the flu to report. He saw Dr Hussain on that day (Id., 104-110, 125).

The next day, May 1, he asked his girlfriend to call to the company on his behalf (Id., 115, 124). On that day, after a visit to the doctor, he went to the company. At that time, he was told the only jobs available were for ship pipe fitters and welders (Id., 116). Later, he checked back, but again he was told there were no jobs available.

When the Claimant gave his deposition, he stated that he did not drive. He alleges that at the time he gave the statement it was correct, and that he did not start running errands for his friend until later. He did not have the use of a car until he started going with his new girlfriend, the owner of the van (Id., 73, 91).

On May 3-4, 2001, the Claimant was under surveillance.

According to the Claimant, depression forced him to stay in his room for about two years. He was treated by an authorized psychologist and was also in a pain management program. Later, he was treated by Dr. Herbly, a psychiatrist, as of 1998. He is now treated by Dr. Wikstrom , also a psychiatrist.

Jawed Hussain is the primary treating physician. For a time the Claimant was treated by Dr. Rowe. The Claimant received steroid shots in the neck in an attempt to relieve the hand pain. At first, there was some relief, but the steroids did not relieve the pain (Id., 64). The Claimant eventually returned to Dr. Hussain. The date of maximum medical impairment is July 14, 1999. Mr. Townsend never returned to work.

Medical Evidence

As stated, on June 24, 1994, Claimant was working as a container lasher for the Employer when a heavy container door fell onto his right dominant hand. According to medical records, he sustained multiple comminuted open fractures to the right third metacarpal and fourth proximal phalanx and multiple soft tissue injuries, including transverse metacarpal ligament as well as third flexor digitorum profundus, third digit, and digital nerve at the same point (CX 1).

He was taken to the Emergency Room and the medical records of evidence reveal he was distressed secondary to pain with his right hand showing crushing injuries, obvious deformity, open fracture and tendon exposure on the dorsal and palmar surface of the right hand. He had no range of motion of his fingers. The Claimant had microvascular revascularization of the third and fourth digits and also had tendon repair. The patient also had several procedures for tenolysis as well as rotational osteotomy of the 3rd and 4th proximal phalanx by Dr. Glassman, a hand surgeon. Claimant was moved to another hospital and placed in a hyperbaric unit in an attempt to help the healing process (CX 1, CX 2).

Over the next two years, Claimant underwent four more surgeries. Amputation of the fingers was discussed as well as taking toes from Claimant*s foot to try to reform his hand. Claimant declined amputation and the reformation using his toes. Dr. Glassman stated on October 5, 1995, over a year after the injury, “Postoperatively, he had a complicated course with significant scarring in the hand which has, despite prolonged physical therapy, left him with an almost useless hand.” (CX 4). Dr. Glassman*s records reveal continuous complaints by Claimant of severe pain in his hand. Dr. Glassman prescribed the pain medication Tylox and then Lorcet for Claimant*s severe pain. Dr. Glassman prescribed attendant care for Claimant for over two years. Dr Glassman completed a Medical Source

Statement on June 15, 1995 and imposed the following permanent limitations:

> occasional lifting-less than 10 lbs; occasional climbing; no crawling; occasional reaching; no handling with the right hand; no pushing/pulling with the right hand; and limited fine manipulation. (CX 4, 19-25).

Dr. Glassman stated that all of the limitations are normally expected from the type and severity of the diagnosis and the diagnosis in this case has been confirmed by objective findings rather than primarily on Claimant*s subjective complaints. (CX-4, pgs. 19-25). In fact, at times, the Claimant had complained about hip and leg pain. Apparently, he had a pin in the right femur from a childhood injury. (CX 4, 46). On March 21, 1997, Dr. Glassman approved 10 different job analyses based on a labor market survey, including the jobs of an assembler, shop porter, food delivery driver, inventory recorder, plant technician, door attendant, product vendor, sweeper driver, courier driver and courier. (EX 7-14). On April 22, 1997, a Functional Capacities Evaluation was completed, which recommended physical demand characteristics within the sedentary level. On September 25, 2000, Dr. Glassman approved job analyses for the Claimant as a trailer attendant with a thrift store, a customer service representative with a thrift store, as an usher in a theater, as a security guard, and as a cart attendant with Target. (EX 15-EX 19).

(a) A trailer attendant job with the thrift store.
(b) A customer service representative with the thrift store.
(c) An usher for AMC Theaters.
(d) A security position with Yarborough Security.
(e) A cart attendant with Target.

Dr. Glassman last treated the Claimant on July 28, 1997 (CX 4, 47-48). On October 10, 2000, the Claimant was seen by Dr. Glassman solely for an impairment rating. The hand was tender on palpation and flexion and extension were limited. At that time, he noted that the ring and middle finger were a complete (100%) loss; and noted hand atrophy and pain. (CX 4, 49-50).

The Claimant was treated by Jawed Hussain, M.D., originally at Genesis Rehabilitation Hospital and Centers, on November 13, 1995. (C-5). Claimant remains under the care of Dr. Hussain to this date. In addition to the physical problems, on October 6, 1995, Dr. Glassman advised that the Claimant needed psychiatric treatment (CX 4, 31). Dr. Hussain also sent the Claimant for psychological treatment. During 1996, Mr. Townsend attended twenty six sessions of individual psychotherapy with Dr. Becky Olson and completed a comprehensive pain rehabilitation program from August 7, 1996 through August 15, 1996. In the discharge summary it was reported that the Claimant made significant progress to the effect that the focus on his disability decreased, self-isolation decreased, and he had started to come to terms with his hand disfiguration. The Claimant was discharged from the pain program because he did not believe treatment would help (CX 5, 61-63).

In May, 1998, Dr. Hussain referred Claimant to the Baptist institute of Pain Management for evaluation and possible treatment of reflex sympathetic dystrophy. Daniel Rowe, M.D. started Claimant on a series of right stellate ganglion blocks in an attempt to control his severe, constant, burning, throbbing, aching right hand pain. (CX 7, 26-28). Claimant underwent treatment as planned by Dr. Rowe.

Unfortunately, the pain was not resolved by the treatment. Dr. Rowe confirmed the diagnosis of reflex sympathetic dystrophy (Complex Regional Pain Syndrome I) of the right upper extremity and he returned Claimant to Dr. Hussain for palliative care. On May 12, 1999, Dr. Rowe placed the Claimant at maximum medical improvement from a pain management standpoint with the restrictions of no use of the right upper extremity. He originally deferred further impairment ratings to Dr. Glassman and palliative care to Dr. Hussain. (EX 22, 72).

Dr. Rowe noted on June 21, 1999, that Claimant was continuing to suffer severe, constant, burning, throbbing, aching pain and had significant atrophy and loss of function of the right hand. Dr. Rowe imposed work restrictions of no use of the right upper extremity and he noted that Lorcet is a narcotic which has the capacity to impair the mental and or physical abilities required for performance of certain tasks of gainful employment including sustained concentration and memory. (CX 7, 2).

Dr. Hussain's notes reflect that the Claimant has atrophy in the right hand and holds the arm like a stroke victim would (CX 5, 1, 8, 56-58). A diagnosis is chronic pain syndrome (Id). The entire arm is described as non-functional (CX 5, 13). The Claimant complains of pain in the entire right arm (CX 5, 3). The Claimant will need long term use of narcotics to stem the pain (CX 5, 84). He also has drowsiness due to a side effect from his medication (CX 5, 9).

On July 5, 2000, Dr. Hussain approved the job description of a cashier and that of an assembler of floor lamps. (EX 2, EX 3). On April 23, 2001, Dr. Hussain approved the job description of a badge checker. The cashier for Central and Alright Parking required no lifting and sitting and standing, each half a work day. The employee would be required to take a parking ticket, calculate money owed based on time of parking, take money and make change. Paperwork for totals during the day is required. The electronic assembler position with I Tech required assembly of floor lamps. The job is described as simple and required lifting up to fifteen pounds. The employee would be allowed to sit eighty-five percent (85%) of the day and reaching was only at waist level. The badge checker position with North Florida Shipyards was described to Dr. Hussain as requiring employees to check identification badges of persons entering a facility and sit inside a guard shack. The hours were from twenty to forty hours per week, and the employee would be allowed to sit eighty nine percent (89%) of the time, stand ten per cent (10%) and walk 1%. As described, no lifting was required.

In the post hearing deposition, Dr. Hussain advised that he still approves the "badge checker" position; however, he advised that if the job requires patrol of a perimeter, search with a flashlight, to open and close doors, and detain persons who may be engaged in criminal acts, check bags to determine whether company property is inside them, these matters were not part of his approval. He would have to seek additional information. He also stated that an "approval" of a job does not necessarily mean that the patient can do it. It means that the patient can try to do it. He also acknowledged that on May 1, 2001 the Claimant had complained of increased pain. (EX 25).

Dr. Hussain and Dr. Glassman noted Claimant*s anger and frustration over his injury. They both

recommended on multiple occasions that he see a psychiatrist. On July 10, 1997 the Claimant was evaluated by Allan Harris, Ph.D., (CX 5, 49-58). An administration of the Wechsler Adult Intelligence Scale, Revised, the Claimant achieved a verbal scale IQ score of 67 and a performance scale IQ score of 66 and a full scale IQ score of 65. An MMPI (Minnesota Multiphasic Inventory) test was also administered. According to Dr. Harris:

> Although this individual appears to be experiencing genuine distress over his injury, in my professional opinion he exaggerates his psychological symptoms and possibly his physical discomfort in order to achieve external **incentives such** as sympathy, avoidance of work and responsibilities and obtaining financial compensation. Both the MMPI and JQ testing were invalid due to the patient*s deliberate efforts to fake bad.

Emphasis added by Dr. Harris, Id. He rendered the following diagnoses:

- Malingering
- Adjustment Disorder with Depressed Mood
- Alcohol Abuse in reported remission

Dr. Harris advised that psychiatric treatment was not necessary. On August 17, 1997, Dr. Ernest Miller, a psychiatrist, performed an Independent Psychiatric Evaluation noting that the Claimant was depressed but was functioning in the average intelligence range, had good command of the English language. The Claimant resisted the doctor's attempts to examine the hand. Dr. Miller in his report felt that the Claimant was resistant to the idea of entering a rehabilitative program and opined that the Claimant was committed to a state of chronic invalidism. (EX 22, 130-134).

A psychiatric evaluation with Hazem Herbly, M.D. was eventually authorized by the employer on July 24, 1998. Dr. Herbly noted that Claimant*s intelligence appeared to be within the low average or borderline range. At the first office visit with Claimant he assigned a GAF (Global Assessment of Functioning) of *55*. (CX 8, 23). At his deposition, Dr. Herbley explained that a GAF of *55* indicates a moderate degree of limitation in social and occupational functioning. (EX-22, p.21). Claimant started treatment with Dr. Herbly in December, 1998, and therapy with Beth Shadden, M.Ed, LMIHC, in March, 1999. (CX 9) Claimant made good progress while he was under the care of Dr. Herbly and Beth Shadden.

Dr. Herbly's final diagnosis is dysthymic disorder, or mild depression (EX 2, 3). On October 11, 1999 Dr. Herbly determined that Mr. Townshend reached maximum medical impairment and assigned an eight percent permanent partial impairment rating as a result of Claimant*s depression (EX 22, 10-11). Dr. Herbly continued as Claimant*s treating psychiatrist after placing him at maximum medical impairment. Claimant continued seeing Dr. Herbly*s therapist after reaching maximum medical impairment. During the time Claimant saw Dr. Herbly, several different anti-depressant medications were prescribed including Wellbutrin and Celexa. Dr. Herbly noted that Claimant had taken Paxil in the past with no response. Claimant was unable to tolerate Wellbutrin and Celexa. (CX 8, 18-20). On April 19, 1999, Dr. Herbly prescribed Prozac. Claimant had some problems with Prozac, but with adjustments to the dosage he was able to tolerate it. Claimant complained to Dr. Herbly in January, 2000 that he was experiencing sexual dysfunction. Dr. Herbly prescribed Viagra to counter the sexual dysfunction side effect of Prozac. (CX 8, 4-11).

On January 16, 2001, Dr. Herbly approved two job descriptions for an appointment setter and a table wiper. (EX 22, 32-33). The appointment setter required ninety percent (90%) sitting, five percent (5%) standing, with no lifting. It did require the Claimant to talk with potential customers and make appointments. Some minimal computer input was necessary. There were no specific educational requirements for the table wiper. Service Management Systems required Claimant to wipe tables clean and put refuse from table into trash can. This job was available twenty five hours per week and required no lifting over five pounds.

Dr. Herbly ultimately discharged the Claimant from his care. He testified that he did not trust the Claimant or feel comfortable with him. The Employer initially authorized Viagra. (CX 15).The Employer subsequently withdrew it*s authorization of Viagra. Dr. Herbly testified that the Claimant had a repeated pattern of asking him for Viagra prescriptions, which was even more than one a day. He also had doubts as to whether or not the Claimant was taking Prozac, as blood tests failed to show evidence of the drug in the Claimant's system. Dr. Herbly thestified that on one occasion, he gave the Claimant thirty Viagra pills and after ten minutes, the Claimant called wanting a refill. Dr. Herbly testified that his concerns developed over a period of time. (EX 22, 15, 16, 17, 25, 30, 36, 37).

On July 29, 1999, Beth Shadden, the Claimant's psychotherapist, noted that the Claimant had missed five appointments for psychotherapy, and she needed to hear from him before August 9, 1999, or he would be released. (EX 22, 84).

Claimant is presently in treatment by Thomas R. Wikstrom, M.D. for his ongoing depression. Dr. Wikstrom is of the opinion that Claimant has marked and/or extreme limitations in his ability to deal with the public, interact with supervisors, deal with work stresses, function independently, and maintain attention/concentration. (CX 19). Dr. Wikstrom has continued the prescriptions of Prozac and Viagra. (CX 19).

Although the Claimant was temporarily determined to have reached maximum medical impairment in 1997, both parties accept that maximum medical impairment was reached in 1999. The Claimant alleged that maximum medical impairment was reached based on Dr. Hussain's opinion rendered July 14, 1999 (ALJ 1). Employer/Carrier argues that it was either on that date or those of Dr. Rowe (June 21, 1999) and Dr. Herbly (October 11, 1999), ALJ 2.

"Functional Capacity Evaluation"

On April 22, 1997, a "Functional Capacity Evaluation" was performed by Associated Rehabilitation Clinic. The Claimant was not able to use his right hand effectively; however, the left hand was used to perform range of motion and lifting tests. No measurement of the Claimant's pain intensity or mental status was made (EX 22, 136-145).

Gil Spruance Testimony

Gil Spruance was sworn, qualified and presented vocational expert testimony. Mr. Spruance was initially hired in this case by the employer to evaluate Claimant in 1996. (CX 20; Tr. 160). He was not engaged to provide work searches (Tr 187). Tests were administered. The Claimant has been tested on multiple occasions for the purpose of ascertaining his academic achievement levels. Mr. Townsend

scored in the bottom one percent of the population in reading, spelling and arithmetic on the Wide Range Achievement Test. (WRAT-3) (CX 20; Tr 162, 168). Claimant completed the WRAT-3 utilizing his left hand, which resulted in responses that were barely legible. (CX-20). He was administered the Wechsler Adult Intelligence Scale Revised and received a verbal scale IQ score of 67, a performance scale IQ score of 66 and a full scale IQ score of 65. (CX-5, pg. 50, report of Allen Harris). William Gray, of W.J. Gray, Consulting, obtained similar scores to that of Mr. Spruance. According to Mr. Spruance, the Claimant is limited in reading and writing, and is considered to be functionally illiterate (Tr., 167). Claimant*s past work consists of work as a cook and a meat cutter while in the Merchant Marine between 1968 and 1987 (Id., 164). In 1987, Claimant began work as a longshoreman. His primary job was that of container lasher. Claimant last worked on June 24, 1994, the date of his work- related injury (Id.). According to Mr. Spruance, the Claimant has no skills learned in past relevant work that may be transferrable to sedentary work (Id, 167). Also, the claimant has limited capacity to learn and because the skills he did acquire were long ago, and because he has not worked in several years, any skills that the Claimant may have acquired are not currently relevant (Id, 167-169).

The Claimant reported that he had looked for work at a theater, picking oranges, at a supermarket, at several fast food restaurants and at a hardware chain (Id 170-172). He reported that another vocational expert took him to a thrift store (Id).

Mr. Spruance advised that he had closely scrutinized certain jobs that had been evaluated by Dr. Hussain. He had rejected an electronic assembly job because there had been a lifting requirement beyond fifteen pounds, which is beyond the Claimant's exertional functional capacity (Id. 172). In a discussion with Dr. Hussain, agreement was reached that it was not very realistic that Mr. Townsend could maintain a job on a regular basis (Id 173).

During the course of testimony, Mr. Spruance was directed to the position designated as badge checker. This job requires an employee to check employee identification badges on a job site four to eight hours per day, twenty to forty hours per week. It requires a worker to stand ten percent (10%) of the time, sit eighty nine percent (89%) of the time and walk one percent (1%) of the time. No lifting, carrying climbing, stooping or reaching is required (Id 179-180). In a discussion with the Claimant, Mr. Spruance was told that it was to be a night job that requires some checking around the premises using a flashlight (Id 180). According to the Claimant, the worker also inspects other employees clothes and work bags (Id 181). When Mr. Spruance presented the duties to Dr. Hussain, the job was rejected (Id).

Given the Claimant's physical profile, the category of work presented is extremely small in Florida, limited to less than one tenth of one percent (0.1%) of the entire labor market (Id. 182). According to Mr. Spruance, it is "not unreasonable" that pain could further restrict that fund of jobs, and keep the Claimant from having adequate attendance and regularity (Id. 183).

Based upon a complete evaluation, Mr. Spruance rendered an opinion that the Claimant will not be able to work in a competitive job market on a continuous basis (Id 186). On cross examination, Mr. Spruance added that he had recommended that the Claimant enter a work hardening program (Id.

188). He also admitted that the labor market in Jacksonville is better that in most of the rest of the country (Id. 190).

James Spivey

Mr. Spivey, Personnel Director, North Florida Shipyards, was called by the Employer/Carrier. He has held his current position for two years. Mr. Spivey was contacted by Mr. Albert, who inquired whether he had any positions for a person with a handicap or no use of his hand. He advised Mr. Albert that he had several, and at that time had two open positions he wanted to fill. He was sent a letter by Mr. Albert advising that Mr. Townsend would be sent for an interview. The interview took place on April 30, 2001. He personally performed the interview. After the Claimant completed an application, Mr. Spivey offered the Claimant the back gate security position (Id., 194-196). Mr. Spivey described the job duties as follows:

- Check the bags of the employees coming and going or anyone who wishes to enter the shipyard at the back gate. "If they don't have proper identification send them to my office."
- Physical duties require one to sit or stand in an air conditioned booth, and to match the badge with the face.
- If there were a problem, the employee would phone the main gate for further action.

Id., 195-197. Mr. Spivey testified that a written job description applies to positions at both gates. The written description was provided to the Claimant. If the Claimant felt that someone had company property, he would inquire, and if so, ask for a permission slip (Id., 198).

The Claimant advised Mr. Spivey that at times the medication he was taking made him drowsy, and that he may fall asleep on the job. Mr. Spivey testified that the company would occasionally have someone check on him, and that they would help him become acclimated (Id., 199-200). The Claimant asked to work the middle shift, 3:00 p.m. to 11 p.m. Mr. Spivey testified that the company had several other employees "on that particular post" that also work the same position and doze (Id., 200).

The job was offered, and the Claimant was to return the next day, May 1, 2001. On that date, a call was received from a person representing the Claimant, who advised that the Claimant had a relapse. The job was filled by another person on May third (Id., 201). The Claimant called on the tenth and was told at that time that the job had been filled (Id.).

On cross examination Mr. Spivey testified that the job in question was a security position, and is a "high turnover" position that doesn't pay well (Id., 204- 205). The written job description involves requires the employee to inspect the premises, patrol a perimeter, and requires the completing of incident reports. He contended that he did not tell the Claimant that he would have to perform the duties enumerated in the written job description (Id., 215). Mr. Spivey admitted that prospective employees are given the job, but that they aren't able to maintain the position and generally can not do it (Id., 214).

Jerry Albert

Mr. Albert was called by the Employer/Carrier as a vocational expert. On July 25, 1995 Mr. Albert interviewed the Claimant and he and his firm performed a functional capacity evaluation, a labor market

survey, provided job leads, met with the Claimant's physicians, and contacted professionals at rehabilitation clinics. The labor market survey was first performed March 12, 1997. According to the testimony, the Claimant's age, work experience, lack of transferrable skills, and his overall emotional state were taken into consideration (Id., 219). Enumerated factors are as follows:

- Limited (9th Grade) education.
- Had pain in his hand.
- Was status post several surgeries.
- Who had work experience in the Merchant Marine.
- Who had been a longshoreman since 1987.

Id. According to the testimony, Mr. Albert considered that the Claimant has very limited use of the right, dominant hand, and has pain. But he attributed no psychiatric limitations (Id., 220).

Mr. Albert began active placement with the Claimant in June, 2000. He testified that he relied on assessments by Dr. Glassman, because he did not receive cooperation with Dr. Hussain, Dr. William Knibbs[1], an occupational medicine specialist. He looked for entry level jobs that called for simple verbal instructions and the use of one hand. He referred the Claimant to a trailer attendant or customer service worker position at a Vietnam Veterans Association facility. The position entailed a thirty five hour per week job receiving donations, such as furniture, clothing and electronics, and providing a receipt. The employer needed someone to work on weekends, but the Claimant did not follow up (Id., 227). Mr. Albert wanted to take the Claimant to Target Stores at that time, but the Claimant advised that he was told that he was to attend only one job placement session (Id., 228). Later he sent the Claimant to the appointment at North Florida Shipyards. Mr. Albert did not have a written job description for the badge checker position. 230. According to Mr. Albert, as the job was described by Mr. Spivey, the Claimant could perform it (Id., 232).

Also, based on approval by Dr. Glassman, in September, 2000, a theater usher position, security guard, and cart attendant at Target, and the trailer attendant position were also identified as appropriate (Id., 232-233). In January, 2001, Dr. Herbly approved an appointment setter position, and a position where the claimant would wipe tables at a restaurant. The cart attendant requires a person to lift to twenty-five pounds, and entails five percent walking and twenty-five percent standing. It involves reclaiming carts and items and restocking them (Id., 234).

Based on the evaluation of the Claimant, Mr. Albert testified that he would have the capacity to perform the jobs in question at all times since he reached maximum medical impairment (Id., 234-242).

On cross examination, Mr. Albert testified that he had spent a couple of hours with the Claimant. He admitted that he knew that the trailer attendant position was not accepted by Dr. Hussain (Id., 243). He also testified that he was not aware that Dr. Glassman had not seen the Claimant for over three years when he passed on the jobs in June 2000 (Id.).

Mr. Albert also noted that the claimant had dozed in his presence, and if he were to do that jobs, it

[1] Note that it is spelled "Nibbs" in the Transcript.

would counter-indicate all work (Id., 246). When presented with the mental capacity form prepared by Dr. Wikstrom, he admitted that the Claimant would have a difficult time finding a job with the residual functional capacity presented (Id., 255).

Rick Robinson's Report

On January 27, 2000, Rick H. Robinson, MEd., Certified Rehabilitation Counselor, on behalf of the Employer/Carrier, performed an interview, read two previous vocational evaluations, completed by two "highly respected" rehabilitation counselors, Mr. Albert and Mr. Spruance. Based on the information, the Claimant is limited to a sedentary material handling classification:

> I do feel that Mr. Townsend will be at a disadvantage in terms of obtaining sedentary work as he has very low academic scores in the area of reading, spelling, and arithmetic, and an IQ placing him at or near the range of mental retardation. Mr. Townsend does not have transfer skills that would allow him to immediately transition into new employment, and therefore any job that Mr. Townsend would obtain would require job specific training by the employer in order for Mr. Townsend to successfully compete in the job. As part of my interview, I questioned Mr. Townsend*s ability to perform simple activities, such as counting money and making change, and he stated that he is able to do this, but only with one hand.

Mr. Robinson requested an opportunity to perform a labor market survey,

> I will focus my attention in searching for jobs that fall within the sedentary material handling classification and that could be performed by a person with one non-dominant hand. The job would also require an employer who is willing to train an employee in the essential functions of the particular job.

However, Mr. Robinson did not perform the surveys (CX 21).

Surveillance Video

On May 3 and May 4, the Claimant was subject to surveillance. He was noted to run errands, driving a van. According to the Employer/Carrier the video discloses:

> (1) the Claimant leaned on a metal railing, putting his body weight on the right upper extremity,
> (2) he smoked with his right hand,
> (3) he dialed a telephone using his right hand, holding the phone in his right hand,
> (3) he drove a van using his right hand, backing up and going forward,
> (4) he opened the van door with his right hand, while also holding a bag of food,
> (5) he carried bags of food in his right hand,
> (6) he held a cantaloupe in his right hand,
> (7) he bagged oranges, picking them up with his right hand and putting them into a bag and,
> (8) with definition and without any flinching or pain, strongly shook hands with a friend using his right hand. He talks waving his arms in the air without any apparent limitation or concern about who might see him.

EB. A review of the video discloses that the Claimant did substantially all of the above. Although the Claimant at times guarded the hand, holding it in an upright position, he is depicted using the hand for gestures, picking up items, carrying objects and even shook hands with a friend, using the dominant hand. I can not comment on whether or not the Claimant was in pain during the period of surveillance. I did not observe the Claimant using the right hand to drive and did not see him leaning on it.

Medical Profile

I find that the Claimant reached maximum medical impairment on July 14, 1999. As previously established, although the Claimant was temporarily determined to have reached maximum medical impairment in 1997, both parties accept that maximum medical impairment was reached in 1999. The Claimant alleged that maximum medical impairment was reached based on Dr. Hussain's opinion rendered July 14, 1999 (ALJ 1). Employer/Carrier argues that it was either on that date or those of Dr. Rowe (June 21, 1999) and Dr. Herbly (October 11, 1999) ALJ 2. The record reflects that Dr. Hussain was the Claimant's primary treating physician at that time, and was the referring physician.

Based on the medical evidence, I find that the Claimant is limited to a narrow range of sedentary work capacity but also has both an intellectual and an emotional overlay to his residual functional capacity. All of the medical evidence shows that the Claimant is essentially a one handed person, due to the presence of reflex sympathetic dystrophy, status post crush injury and multiple surgeries, with full use of the subdominant hand and limited use of the dominant right hand.

It also must be noted that the following applies to a determination of the residual functional capacity in this case:

1. The Claimant complained about pain in the hip and right femur. (CX 4, 46, 49;CX 5, 63)[2].
2. There is evidence that the Claimant exhibits drowsiness due to side effects from medication (CX 5, 9).
3. The Claimant has a sleep disturbance (CX 5, 56-63).
4. The Claimant complains of severe depression (CX 5, 56). He doesn't go out due to the embarrassment of his "deformity" (CX 5, 56; Tr, 81). He testified that he exhibits anhedonia (Id.). According to the Claimant, he has been suicidal and perhaps homicidal, although that is not substantiated by the recent record (Tr., 90).

On numerous occasions, he has been limited by his physicians to sedentary work, for example:

- Medical Source Statement, Dr. Glassman, June 25, 1995 (CX 4, 19-25).
- January 7, 1999, Dr. Hussain (CX 5, 31)
- May 25, 1999, Dr. Hussain (CX 5, 29)
- July 14, 1999, Dr. Hussain (CX 5, 27)
- September 27, 1999, Dr. Hussain (CX 5, 24)
- Deposition of Dr. Hussain (CX 6, 27).
- Second deposition of Dr. Hussain, May 24, 2001 (EX 25)

By June 15, 1995, Dr. Glassman had imposed permanent work restrictions, including occasional lifting up to ten pounds, occasional climbing, no crawling, occasional reaching, no handling with the right hand, no pushing or pulling with the right hand and limited fine manipulation. (CX 4, 19-25). On April 22, 1997, a Functional Capacities Evaluation was completed, which recommended physical demand characteristics within the sedentary level (EX 1).

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[2] Although Dr. Hussain failed to respond affirmatively in his deposition (CX 6, 48).

Employer/Carrier argues:

- The Carrier has paid permanent partial disability based on the 20% rating assigned by Dr. Glassman and has relied on the opinion of Dr. Glassman, as he was the surgeon who performed all the surgeries on the Claimant's right hand and who was the only doctor to give a specific impairment rating for the Claimant's hand injury. Also, both Dr. Rowe and Dr. Hussain defer to Dr. Glassman for the rating.[3] Dr. Glassman relied on the AMA Guide in formulating his rating, and he gave a specific well reasoned opinion based on loss of motion and sensory loss according to that Guide.

  ....In this case, we do have a well reasoned opinion from Dr. Glassman that has been documented on several occasions throughout his course of treatment. There is no conflict among physicians regarding the rating. Dr. Hussain, the Claimant's most recent treating physician, has deferred to Dr. Glassman with regard to ratings on several occasions and Dr. Glassman's opinion should be accepted. Although it is clear the Claimant has significant loss of use of his right hand and is functionally limited, there is nothing to indicate functional disability beyond that outlined by Dr. Glassman. Furthermore, a review of the surveillance video offered suggests that the Claimant's functional ability is well beyond what the Claimant had previously testified to and complained of to his treating physicians.

  As treating physicians all appear to have relied on Dr. Glassman for the impairment rating and, as the treating surgeon he is most familiar with the injury and is board certified in plastic and reconstructive surgery, the opinion of Dr. Glassman must be accepted in this case as the most credible evidence for the proportionate loss of use consistent with the requirements of 33 U.S.C. §908(c)(3). According to Dr. Hussain, the Claimant's pain is limited to his right hand and there is no justification to extending the permanent partial award to the right upper extremity. All impairment ratings made by Dr. Glassman have been to the hand, with no indication of pain or limitations beyond the palm, middle, and ring fingers.

- Dr. Glassman gives no indication that the claimant's condition has worsened since his release in 1997 and the impairment rating in 2001 is consistent with Dr. Glassman's earlier opinions in 1995.

EB. In support, I am directed to the job approvals set forth at Exhibits EX 16-EX 20.

The Claimant argues:

The diagnosis of Reflex Sympathetic Dystrophy was confirmed during those three years and there is no evidence that Dr. Glassman was made aware of that diagnosis prior to approving the jobs. Claimant underwent extensive treatment at the Baptist Pain Institute during those three years. There is no evidence Dr. Glassman was made aware of that treatment prior to approving the jobs. Claimant was under the care of a Psychiatrist during the three years he did not see Dr. Glassman. There is no evidence Dr. Glassman was made aware of the specifics of Claimant*s psychiatric treatment prior to approving the jobs.

CB.

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[3]I am directed to CX 6, 29 where Dr. Hussain did not establish a rating.

Actually, although other physicians and medical sources may have deferred to his opinion, a complete review of the record discloses that Dr. Glassman did *not* render a final rating for the Claimant. To the contrary, he did not establish a residual functional capacity at the time of maximum medical impairment in 1999. The parties have stipulated that maximum medical impairment was achieved in 1999, four years after the Medical Source Statement was issued and two years after the Claimant was last treated by Dr. Glassman. I accept Dr. Glassman's opinion in part pertinent, that the Claimant is limited to sedentary work activities, and that the Claimant has restrictions to certain postural movements, i.e. he can perform occasional climbing, reaching on a very limited basis, but no crawling.

Although the Claimant was released as a patient by Dr. Herbly, he is still an active patient of Dr. Wikstrom. On October 11, 1999 Dr. Herbly determined that the Claimant had reached maximum medical impairment and assigned an eight percent permanent partial impairment rating, ostensibly using the AMA Guides for the body as a whole, as a result of Claimant*s depression. (EX 22, 10-11). However, according to his deposition testimony, this impairment does not involve any work related restrictions (Id.). Dr. Herbly prescribed 20 mg. Prozac for the Claimant's depression (CX 8, 2). The Prozac had a side effect; sexual dysfunction (CX 8, 9, February 21, 2000).[4]

During the initial part of his deposition, Dr. Herbly characterized the Claimant's mental impairment initially as generating an insignificant intensity of symptoms (EX 22, 2-6). However the initial report notes a Global Assessment of Functioning ("GAF") of 55, which can generate moderate difficulty in performing occupational functions (EX 22, 6). Moreover, Dr. Herbly did not relate the pain in the hand and arm to the Claimant's mental incapacity (Id). Over time the Claimant was treated and he improved. Dr. Herbly eventually determined that the GAF was 65 at maximum medical impairment. He related that Claimant has a permanent impairment relative to dysthymia, and that it was eight percent (8%), ostensibly of the body as a whole based on the AMA guides, a standard method for rating medical impairments. On cross examination, Dr. Herbly noted that the dysfunction was "moderate" as to socialization (Id., 12). The written opinion originally did not express a functional impairment; it set forth a percentage, and attributed four percent to affect, three percent to behavior, and one percent to thinking (Id, 75). Another version notes:

- No impairment in activities of daily living.
- Moderate impairment in social functioning.
- Mild impairment in concentration.
- Mild impairment in adaption.

EX 22, 68, 74.

During the time that the Claimant was in Dr. Herbly's treatment, he was referred to a therapist, Beth Shadden, M.Ed., LMHC, from March 4, 1999 through March 12, 2001 (CX 9). The office notes show that the Claimant had progressed greatly by therapy. He had become a church member. He was able to socialize. He no longer was preoccupied with thoughts of the hand (Id, 1-2). However, during the period when Dr. Herbly determined that the Claimant had dysthymia and had reached maximum medical impairment, he continued to need treatment for feelings of hostility, pain, anger, anxiety and

[4] See discussion below.

insomnia (Id.). Although the Claimant reportedly had no restriction to daily activities, he was treated by Dr. Shadden for problems reasonably related to daily activities after the reported date of maximum medical impairment. Although the Claimant reportedly had a mild impairment in adaption, Dr. Shadden continued to treat the Claimant and facilitate adjustment after the date of maximum medical impairment (CX 9). My conclusion is that Dr. Herbly did not accurately reflect the actual intensity and severity of the Claimant's mental state at the date he determined that Mr. Townsend had reached maximum medical impairment.

Dr. Wickstrom saw the Claimant on one occasion. The Claimant reported that he could not use the right hand at all and that he was preoccupied by pain. He noted that the Claimant has clinical or major depression, affecting his memory, concentration, ability to make decisions, follow commands, etc. He noted the following restrictions:

- Marked to extreme inability to interact with supervisors.
- Marked to extreme inability to deal with stress.
- Marked to extreme inability to function independently.
- Marked inability to maintain attention and/or concentration.
- Moderate to marked inability to follow work rules.
- Moderate to marked inability to relate to coworkers.
- Moderate to marked inability to use judgment.
- Marked inability to deal with the public.
- Extreme inability to deal with complex instructions.
- Moderate inability to understand and carry out simple instructions.

"Moderately" means not seriously limited. "Marked" means that the limitation is serious. "Extreme" means that the limitation is one hundred percent (100%). CX 19.

Also of record are the opinions of Dr. Harris, who in 1997, determined that the Claimant is a malingerer and an alcoholic (CX 5) and Dr. Ernest Miller, who noted that the Claimant was depressed but was functioning in the average intelligence range, had good command of the English language. Dr. Miller in his report felt that the Claimant was resistant to the idea of entering a rehabilitative program and opined that the Claimant was committed to a state of chronic invalidism. (EX 22, 130-134).

I am not bound to accept the opinion or theory of any particular medical examiner, rather I may rely upon my personal observation and judgment to resolve conflicts in the medical evidence. A judge is not bound to accept the opinion of a physician if rational inferences cause a contrary conclusion. ***Todd Shipyards Corp. v. Donovan***, 300 F.2d 741 (5th Cir. 1962); ***Ennis v. 0'Hearne***, 223 F.2d 755 (4th Cir. 1955).

Employer argues that I should give controlling credit to Dr. Glassman's rating of 20% of the hand. In a letter dated August 12, 1997, Dr. Glassman noted, "the list of jobs given indeed may not be fitting for him, however, I feel it is to seek some sort of employment to keep his mind active...." CX 4, 48. The record discloses that Dr. Glassman was not provided with the entire record extant as of September or October, 2000, that could have been used to fully evaluate whether there was more information since 1997. It is apparent that a 20% rating of the hand does not include the consideration of the Claimant's pain. Morever, it does not consider the following:

- Mental impairment.
- Range of motion of the dominant arm.
- Inability to use the subdominant arm and hand as the dominant hand and arm.
- Nature of current medication and side effects.

Again, Dr. Glassman's rating does not reconcile the fact that Dr. Herbly determined that the Claimant reached maximum medical impairment on October 11, 1999 and assigned an eight percent permanent partial impairment rating as a result of Claimant*s depression (EX 22, 10-11).
Although Dr. Glassman's most recent records note the presence of hip complaints, he never addressed whether or not they are competent to produce functional restrictions not included in the hand (CX 4, 49). In 1997, while at the "Functional Capacity Evaluation", the Claimant needed to sit on several occasions due to complaints of hip pain(EX 22, 140). On June 3, 1999, the Claimant was examined by James McL. Perry, M.D., Assistant Professor of Orthopedics at the Shands Hospital, University of Florida due to complaints of imbalance and pain in the right tibia area. Dr. Perry found the Claimant to be a poor historian. On examination the hip had limited flexion on the right and rotation was limited. X-rays noted an old hip nail arrangement and significant degenerative changes in the right hip. Although Dr. Perry referred the Claimant to Neurology, no exhibit records show that he has been treated. (CX 8, 14).

The claimant's credible complaints of pain alone may be enough to meet his burden. ***Anderson v. Todd Shipyards Corp.***, 22 BRBS 20 (1989); ***Richardson v. Safeway Stores***, 14 BRBS 855 (1982); ***Miranda v. Excavation Constr.***, 13 BRBS 882, 884 (1981); ***Golden v. Eller & Co.***, 8 BRBS 846 (1978), *aff'd*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). On the other hand, a judge may find an employee able to do his usual work despite his complaints of pain, numbness, and weakness, when a physician finds no functional impairment. ***Peterson v. Washington Metro. Area Transit Auth.***, 13 BRBS 891 (1981).

According to the Claimant, the palm is extremely sensitive. To reiterate, two middle fingers of the right hand had been crushed. The arteries and veins were cut and stripped and later sewn back. (Id., 58-59). He described burning pain. He also related that he has a sensation when it feels frozen; however, intermittently, it is throbbing with pain. Sometimes it "start thumping". Id. The thumb and small finger were not crushed and are not painful (Id., 60). On a pain scale from one to ten, he alleges that the pain is usually an eight in intensity (Id., 62). According to the Claimant, he is in pain all day, every day (Id.). He can not place any pressure on the palm of the hand (Id., 120). The pain has caused him to seek emergency care at a hospital about three or four times (Id., 62). The Claimant takes Lorcet four times per day, and Celebrex as needed (Id., 66). According to the Claimant, the medication does help the pain, but it causes him to be drowsy, and the mouth becomes dry (Id.). "I go to sleep all the time." Id., 67. According to the Claimant, he can not do anything due to the hand pain (Id.). He has "good and bad days". Id., 75. He alleged he needed an injection for pain control to enable him to attend the hearing (Id., 77). In order to sleep, he must cover the hand with a pillow to avoid sharp pains (Id., 120). Sometimes he gets shooting "fire-like pain". 120. It also has a tendency to "freeze up, " become inflexible (Id.).

The Claimant says that he misses "being happy", which I take as meaning that he is depressed (Tr 85).

As a result of the depression, according to the Claimant, he has an inability to get along with other people (Id., 77-78). He stated that he has a poor relationship with his children and grandchildren because if an inability to play with them (Id., 78). He regrets that he can no longer be active physically (Id., 79). He also alleges that he has had an inability to get along with women. "Every time I be around women, I just freeze up.... I need to hide my hand all the time...." Id, 81. He doesn't go out due to the fear of embarrassment. He thinks that people think less of him and will ridicule him because he has an observable defect in the hand. As a result, he alleges that he has cut himself from his friends and family (Id., 81). Although he improved on Prozac to the point where he began to have a relationship with a woman, the Prozac has stripped him of his sexual capacity. Viagra is effective (Id., 83).

The surveillance evidence clearly shows the Claimant performing activities that he has denied that he could perform. There are inconsistent statements in the record. And the video impeaches some of the Claimant's assertions about his capacity to perform work related activities. If the purpose of surveillance films is to impeach a claimant's assertions as to the extent of his disability, the degree of impeachment must be substantial to have any effect on the fact-finder. Demonstrative evidence such as a surveillance film is, like all evidence, subject to interpretation and is weighed along with all other evidence in the case. Cases under the LHWCA, a humanitarian and beneficent statute, particularly are to avoid a "harsh and incongruous result." There are times, however, when but one conclusion can be drawn from video evidence under the LHWCA. In ***Phillips v. California Stevedore & Ballast Co.***, 9 BRBS 13, 16 (1978), the judge relied primarily on the medical opinion of the independent examiner that the claimant could no longer physically perform certain tasks. The Board, however, after watching the same surveillance films as the judge, reversed the award of benefits with these words:

> The movie films, however, show claimant actually engaging in many of the same physical tasks ... without any evident restriction or discomfort. It is "patently unreasonable" to believe that the claimant can mount, dismount and ride a horse but cannot climb and ascend from ships' ladders and cargoes. To reach any other conclusion is to exult fantasy over reality.

9 BRBS at 16.

I note that the Claimant has related that the dominant hand is always susceptible to excruciating pain. I accept that the Claimant has not been completely truthful about the nature of the functionality of the arm and hand. He also has not been truthful about the intensity of his pain. In a deposition, given December 4, 2000, the Claimant alleged that he could not use the hand at all, and could not even pick up a piece of paper (Id., 127-129). In the video, he can be seen performing activities that should be precluded if his testimony is accepted. In his deposition, the Claimant testified that he was basically unable to do anything with his right hand. In response to specific questions regarding picking up paper, holding a Coke can, opening a car door, and driving, he said flatly he could not do those things. The video surveillance, in part, impeaches Mr. Townsend's testimony with regard to functional use of the right hand and further must raise questions regarding the Claimant's subjective complaints to Dr. Hussain, Dr. Herbly and to Dr. Wickstrom. He admitted that in the surveillance video, he is seen picking up items with the right hand. He admitted that he was seen opening a car door with the right hand. He also admitted that although he testified he could not drive on I-95 due to fear of large tractor trailer truck

rigs, he is seen on the video driving on I-95(Id., 132-134). However, the surveillance does not disclose activities that I would consider to beyond the sedentary capacity established elsewhere in the record. Claimant was not seen lifting items that are clearly beyond ten pounds, was not seen carrying items that are clearly beyond ten pounds. He is not seen walking and standing more than "occasionally". He was seen occasionally reaching and climbing into the van. And the Claimant is seen favoring the hand at times, although some question is present about the ranges of motion in the fingers and the ability to use the hand repetitively. The video also cover brief periods of time. Any ability to operate a vehicle for a short period of time does not imply that the Claimant would have the exertional capacity to do it more than "occasionally".

It is solely within the judge's discretion to accept or reject all or any part of any testimony, according to his judgment. ***Perini Corp. v. Hyde***, 306 F. Supp. 1321, 1327 (D.R.I. 1969). Therefore I have discretion to accept all of the Claimant's assertions, or accept those that I consider to be substantiated by other evidence.[5]

When an injured employee seeks benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), a treating physician's opinion is entitled to "special" weight. ***Amos v. Director, Office of Workers' Compensation Programs***, 153 F.3d 1051 (9th Cir., 1998) ; *See also*, ***American Stevedoring Ltd. v. Marinelli***, 248 F.3d 54, (2nd Cir., 2001)***; Lozada v. Director, Office of Workers' Compensation Programs***, U.S. Dept. of 1991 A.M.C. 303 C.A.2,1990; Longshore and Harbor Workers' Compensation Act, §§ 1 et seq. In ***Pietrunti v. Director, Office of Workers' Compensation Programs***, 119 F.3d 1035 (2nd Cir., 1997) an ALJ's findings were reversed by the court because he failed to attribute "great" weight to the opinion of a treating physician. However, I must apply substantial evidence. ***Director v. Newport News Shipbuilding & Dry Dock Co., (Carmines)***, 138 F.3d 134, 140 (4th Cir.1998) states: "[t]he ALJ may not merely credulously accept the assertions of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based." *Id*. To be sufficient the evidence must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." ***Richardson v. Perales***, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting ***Consolidated Edison Co. v. NLRB***, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938)) (internal quotation marks omitted); ***See v. Washington Metro. Area Transit Auth.***, 36 F.3d 375, 380 (4th Cir.1994). The ALJ may not merely credulously accept the assertions of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based.

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[5] The Board will not interfere with credibility determinations made by an ALJ unless they are "inherently incredible and patently unreasonable."***Cordero v. Triple A Machine Shop***, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 **U.S.** 911 (1979); ***Phillips v. California Stevedore & Ballast Co.***, 9 BRBS 13 (1978).

Generally, I am entitled to give greater weight to opinion of treating physician than to that of non-treating physicians, ***Morehead Marine Services, Inc. v. Washnock***, 135 F.3d 366 (6th Cir., 1998).

I credit Dr Hussain's testimony over that of the other medical opinions in this record. He has had the best opportunity to see his patient and has had an opportunity to review a more complete record that Dr. Glassman, whose treatment relationship with the Claimant ended in 1997. He is board certified in physical medicine (CX 6, 4). Dr Hussain is actively coordinating treatment from other medical sources, including pain management and psychiatric treatment. In general, the opinions of Dr. Glassman do not vary greatly from those of Dr. Hussain; however, his opinions that the Claimant should try jobs beyond the Claimant's residual functional capacity must be rejected.

Dr Hussain's opinions are substantiated by those of Dr. Rowe, who confirmed the diagnosis of reflex sympathetic dystrophy (Complex Regional Pain Syndrome I) of the right upper extremity and he returned Claimant to Dr. Hussain for palliative care. Dr. Rowe noted on June 21, 1999, that Claimant was continuing to suffer severe, constant, burning, throbbing, aching pain and had significant atrophy and loss of function of the right hand. Dr. Rowe imposed work restrictions of no use of the right upper extremity and he noted that Lorcet is a narcotic which has the capacity to impair the mental and or physical abilities required for performance of certain tasks of gainful employment including sustained concentration and memory. (CX 7, 2).

In a letter dated August 12, 1997, Dr. Glassman noted, "the list of jobs given indeed may not be fitting for him, however, I feel it is to seek some sort of employment to keep his mind active...." CX 4, 48. The record discloses that Dr. Glassman was not provided with the entire record extant as of September or October, 2000, that could have been used to fully evaluate whether there was more information since 1997. It is apparent that a 20% rating of the hand does not include the consideration of the Claimant's pain. Morever, it does not consider the following:

- Mental impairment.
- Range of motion of the dominant arm.
- Inability to effectively use the subdominant arm and hand.
- Nature of current medication and side effects.

I give no weight to the findings of Dr. Knibbs, who did not fully evaluate the Claimant's residual functional capacity before passing judgment on whether he could perform certain job duties described by Mr. Albert.

I give little weight to the opinions of Dr. Harris. Even if the test results on the MMPI may be read as "faking bad", there is no way to fake a crush injury to the dominant hand that required five surgical procedures and that is competent to produce disabling pain. Dr. Harris did not have records before him that showed a history of alcoholism, rather, a record from a rehabilitation program in November, 1995 stated he was consuming one half pint of gin a day and a six pack or more of beer per day (Dr. Hussain's records from Genesis Rehabilitation, CX 5). This is the only mention to this effect in the

record. Although the Claimant was treated by Dr. Hussain and Becky Olson during the period from 1995 to May 1, 1997, a review of the the record does not disclose that the Claimant suffered from alcohol abuse (See CX 5, 61-63). None of the later records, including those of Dr. Hussain, Dr. Herbly, and Ms. Shadden, who saw the Claimant on a regular basis, disclose such problems. The testimony at hearing and records from Ms. Shadden show that the Claimant is a born again Christian who abstains alcohol. The opinion that the Claimant did not need any further therapy is belied by Ms. Shadden's work and success. And worse, it fails to consider the fact that the Claimant is taking, in addition to the Prozac, strong narcotics for pain, which according to Dr. Hussain have known side effects (CX 6, 61).

As to the validity of the intelligence testing, although Dr. Harris stated that the claimant failed to cooperate, and the results of the IQ testing he performed should be discounted, testing performed by Mr. Spruance, originally also hired by the Employer/Carrier, substantiates that the Claimant is in the lowest percentile in reading, writing and overall intelligence. William Gray, of W.J. Gray, Consulting, obtained similar scores to those obtained by Mr. Spruance and Dr. Harris. Several medical sources have noted that the Claimant has a difficult time remembering facts or explaining himself. Dr. Wickstrom completely disagrees (CX 19). Dr. Perry, in attempting to take a medical history from the Claimant, found the Claimant to be a poor historian (CX 8, 14). And when Dr. Herbly first examined the Claimant on July 24, 1998, he determined that the Claimant was in the low average to borderline range (CX8, 22).

I also give no weight to the opinion of Dr. Ernest Miller, who noted that the Claimant was depressed but was functioning in the average intelligence range, had good command of the English language. The Claimant's life history and his appearance and demeanor belie both of those propositions. So does the test results obtained by Mr. Spruance. Dr. Miller opined that the Claimant was resistant to the idea of entering a rehabilitative program and that the Claimant was committed to a state of chronic invalidism. (EX 22, 130-134). As to the rehabilitative program, again, the Claimant's success with Ms. Shadden belies that proposition.

I give greater weight to the opinion of Dr. Wickstrom that that of Dr. Herbly. I have previously noted that Dr. Herbly did not accurately reflect the actual intensity and severity of the Claimant's mental state at the date he determined that Mr. Townsend had reached maximum medical impairment. Dr. Herbly does have a lengthy history as a treating physician. However, in the end, he exhibits an adversarial attitude. He fails to relate the arm and accident to the Claimant's mental residual functional capacity. At the same time that his psychotherapist, Ms. Shadden, is reporting pain, anxiety, insomnia, frustration over an inability to perform daily activities independently, and an inability to get along with others, Dr. Herbly rendered his opinion that the Claimant had achieved maximum medical impairment. Ms. Shadden's notes are inconsistent with such an opinion.[6] Dr. Herbly relates no restrictions to daily

[6] Although the Claimant did show great improvement later.

activities or work related activities. The Claimant relates difficulties trying to use the off hand (CX 6, 30). He testified that he had to move into his mother's home so that she could care for him. Although he was a cook, his mother (or someone else) must cook for him(EX 22, 220). He cannot wash his clothes. It takes him a long time to get dressed, bathe and perform other daily activities (Tr., 57;CX 9, 4, 8). He still needs help. The Claimant reports dysfunction in balance and tying his shoes (Dr. Perry). He also failed to comment on the effect that the narcotics may have on the Claimant's power to concentrate.

According to Mr. Spruance, the Claimant is limited in reading and writing, and is considered to be functionally illiterate (Tr., 167). The Claimant testified that he had been retained in grade in school because he was not progressing, "About once or twice." He quit in the ninth grade. According to the Claimant, he could not learn to read or write (Id., 40). Although he has a driver's licence, he did not obtain one until he was age 25 or 26. He could not pass a written test to get it, so an oral version was administered. He also alleged that he has limited math skills. The Claimant doesn't have a checking account (Id., 41-42). I accept this testimony. This bolsters the conclusion that the Claimant is functionally illiterate.

Although the Viagra issue may appear an issue for impeachment of the Claimant, according to Dr. Herbly, who challenged the need for the amount requested by the Claimant and accused him of failing to take it as prescribed, he would not accuse the Claimant. "I can't tell you for a fact that he was or wasn't compliant, I just didn't feel comfortable treating him anymore". EX 22, 5. During the course of the deposition of Dr. Herbly, the Claimant implied that Dr. Herbly was disingenuous and that he had rendered his decisions on Viagra and on maximum medical impairment on cue from the Employer/Carrier. Dr. Herbly is board certified in psychiatry (EX 22, 2). He is obviously a qualified physician. However, after initially requesting Viagra, after a challenge by the adjuster, in discussing the need to take medication and the side effect, he reversed his position to "sexual dysfunction has no effect on employment...." Id, 8. See also CX 12, which contains Dr. Herbly's response. Although the sexual dysfunction was a result of the side effect from an authorized medicine he had prescribed, despite the need for Prozac, he condones the rejection of the Viagra. Allegations of abuse did not arise until the adjuster questioned authorization. I find that Mr. Townsend was generally compliant with Dr. Herbly.[7] Soon after Dr. Herbly determined that Mr. Townsend had reached maximum medical impairment, the Claimant advised Mr. Robinson, who was employed by the Employer/Carrier, that he needed his mother's assistance with some aspects of self-care (CX 21). Dr. Herbly noted no restrictions to activities of daily living. And the record reflects that the maximum medical impairment determination occurred while the Claimant was in active treatment by Dr. Herbly's psychotherapist, Ms. Shadden,

[7] I note that Dr. Herbly attempted to document whether the Claimant had abused Viagra, but failed to do so. This gives rise to whether Dr. Herby has a duty to advise the patient regarding allegations that may lead to potential criminal charges. Moreover, he discussed apparently confidential materials in ex parte conversations *in litem motem* with the Employer/Carrier without the Claimant's permission (Id., 9).

who continued to treat the Claimant for restriction to daily activities (CX 9). It is reasonable that Dr. Herbly is an ally of the Employer/Carrier.

Pain is a subjective symptom that is difficult to evaluate. According to Dr. Hussain, pain is the major limitation to the ability to work in a competitive setting (CX 6, 56-57, 64-66). Dr. Hussain opined that the Claimant experiences pain on a daily basis, and that his behavior is effected by pain, and that is the principal reason Dr. Hussain rejected the jobs that Dr. Glassman had accepted (Id., 57). The prognosis to obtain relief from pain is poor (Id., 58-59). The medications prescribed to control pain can reduce concentration (Id, 61). According to Dr. Rowe, the narcotic, Lorcet, would preclude work related activities (CX 7, 2). According to Dr. Hussain, extremes of temperature can cause intense pain (CX 6, 24).

As a specialist in physical medicine, Dr. Hussain holds himself out as an expert on pain (CX 6, 4,58). Dr. Rowe is also an expert in pain management, but is also an anesthesiologist (CX 6, 21). Dr. Hussain and Dr. Rowe diagnosed the condition in the hand and arm as complex reflex regional pain syndrome, Type 1, or reflex sympathetic dystrophy, although a bone scan taken at the time was negative (CX 6, 17-19, 24; CX 7, 2;EX 25). The Claimant complained about hyperesthesia, which is increased sensation in the affected area (CX 6, 21;EX 25). The Claimant had several attempts at rehabilitation to an extent that by 1997, it was assumed that he had reached maximum medical impairment (CX 5). However, the Claimant deteriorated, physically and emotionally. According to the testimony, the typical treatment for reflex sympathetic dystrophy is injection therapy, and the Claimant was administered a ganglion block in 1998 (CX 6, 21-22). By July 14, 1999, Dr. Hussain again found that the Claimant had achieved maximum medical impairment (CX 6, 27-29). However, it is difficult to control pain in reflex sympathetic dystrophy (CX 6, 66). The hyperesthesia remains and the Claimant is sensitive to any kind on sensory stimulus, even the air (EX 25, 5).

Mr. Townsend admitted that in the surveillance video, he is seen picking up items with the right hand. He also admitted that he can be seen opening a car door with the right hand. He also admitted that although he testified he could not drive on I-95 due to fear of large tractor trailer truck rigs, he is seen on the video driving on I-95 (Tr., 130-134). In testimony, he alleged that has the capacity to grip a coffee cup, because he can use his thumb and small finger to do it. The Employer provided the Claimant with utensils, such as a round knife, and a left handed vacuum to help him adapt to the use of the left hand. However, he has not adapted as the lef hand is clumsy. He can drive and run some errands (Id., 68-69). According to the Claimant, he can not use the right hand to drive, and when he was in surveillance, alleges that he drove using only the left hand (Id., 126-127).

For reasons elaborated upon above, I do not accept that the 20% rating of Dr. Glassman is current or is accurate. I do not accept the proposition that the Claimant can perform a full range of sedentary work, although sedentary work is an appropriate framework for evaluation of Mr. Townsend's

impairments.[8] However, the exertional concept does not contemplate the effects of hyperesthesia, intellectual deficiency and depression, which are nonexertional impairments that overlay the sedentary base. I also do not accept the proposition of Dr. Herbly that the Claimant has no work related restrictions due to his mental impairment. I give more weight to the opinion of Dr. Wickstrom, despite the fact that his qualifications are not part of the record and that he has seen the Claimant on only one occasion as of the date of his mental capacity evaluation. On the other hand, his opinion more closely approximates the treatment that the Claimant has been receiving. And his opinions also are substantiated in part by the opinions of Dr. Hussain and Rowe, who document the effects of pain. It is reasonable that pain is competent to a affect the psyche, as reflected in Dr. Wickham's report.

If I completely accept the opinions of Dr. Rowe and Dr Wickham, the Claimant is totally disabled and can not be expected to perform *any* work related activities due to pain and mental restrictions coupled with a reduced exertional capacity. If the judge finds, based on medical opinions, that the claimant cannot perform any employment, the employer has not established the existence of suitable alternate employment. ***Lostaunau v. Campbell Indus.,*** 13 BRBS 227 (1981), *rev'd on other grounds sub nom*. ***Director, OWCP v. Campbell Indus.***, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983), *overruled by* ***Director, OWCP v. Cargill***, 709 F.2d 616 (9th Cir. 1983). However, I do not give controlling weight to the conclusions of Dr. Rowe and Dr. Wickstrom at full blush as they in part vary from the opinions given by Dr. Hussain. I accept that the Claimant is limited to a narrow range of sedentary work, compromised by nonexertional intellectual impairments and mental impairments. I accept some of the nonexertional restrictions, in part pertinent, but the Claimant retains a residual functional capacity that may, in proper circumstances be applied to some work related activities. I reject the "Functional Capacity Evaluation" (EX 1) in part, in that it fails to address the Claimant's mental state. It was not prepared by a physician and no foundation has been laid to accept the science assumed by the report.

As alluded to earlier, although I do not give full credit to the Claimant's testimony, I do not completely reject his testimony. If I accept the Claimant's assertions at full blush, there are no work related activities he can perform. I do not accept that proposition. I accept that the Claimant is limited in the use of the right hand, although not to preclude the complete use of the hand. I note that Dr. Hussain noted atrophy of the hand, which is an objective finding (CX 5, 1, 8, 56-58). This is confirmed by Dr. Rowe (CX 7, 2). Dr. Glassman noted that the ring and middle finger were a complete (100%) loss, also noted hand atrophy (CX 4, 49-50). Dr. Glassman stated that all of the limitations are normally

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[8] Sedentary work is generally defined as follows: Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met. 20 cfr 404.1527(a).

expected from the type and severity of the diagnosis and the diagnosis in this case has been confirmed by objective findings rather than primarily on Claimant*s subjective complaints. (CX 4, pgs. 19-25). The right hip is also impaired, but has not been fully evaluated by the medical experts. The issue with respect to the hand is not whether it is impaired, but rather the intensity, severity and functionality of the hand. I also accept that the Claimant has certain intellectual and emotional impairments that cloud his judgment and complicate any attempt to evaluate the validity of his assertions. I accept that these nonexertional impairments are an overlay to the Claimant's physical impairments.

To a reasonable degree of certainty, the following medical profile (residual functional capacity) applies:

A. Claimant is limited to a job that does not require the use of the dominant hand and arm.

B. Claimant can not lift beyond ten pounds.

C. Claimant can not carry beyond ten pounds.

D. He is limited to walking and standing only "occasionally".[9]

E. He can perform occasional climbing, reaching on a very limited basis, but no crawling.

F. Claimant has the following non-exertional impairments:

1. Claimant can not perform bilateral manual functions and he must be able to change positions at will from sitting to standing to adapt to pain.
2. Claimant has a moderate inability to manage his daily affairs and perform activities of daily living, in that he must use his left (subdominant) hand to dress, bathe and perform personal services.
3. Claimant has moderate restrictions to socialization, in that he is anxious and overly suspicious.
   - Claimant has a marked inability to deal with the public.
   - Claimant has a marked inability to interact with supervisors.
   - Claimant has a moderate inability to follow work rules.
   - Claimant has a moderate inability to relate to coworkers.
4. Claimant has a marked inability to maintain attention and/or concentration.
   - Claimant has a moderate inability to use judgment.
   - Claimant has an extreme inability to deal with complex instructions.
   - Claimant has a moderate inability to understand and carry out simple instructions.
5. Claimant would decompensate in a stressful situation.
   - Claimant has marked inability to deal with ordinary work stress.
   - Claimant has a marked inability to function independently.
6. The Claimant is subject to constant pain, which will become acute intermittently upon sensory stimulation to the dominant hand. He is also sensitive to extreme heat and cold.

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[9] Generally defined as up to one third of a work day. "Selected Characteristics of Occupations", ***Dictionary of Occupational Titles*** ("DOT"), Appendix II, United States Department of Labor, 1991, as amended.

Application of the Medical Evidence to the Vocational Evidence

"Disability" under the LHWCA means incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment. 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. ***Sproull v. Stevedoring Servs. of America***, 25 BRBS 100, 110 (1991); ***Quick v. Martin***, 397 F.2d 644 (D.C. Cir. 1968); ***Owens v. Traynor***, 274 F. Supp. 770 (D.Md. 1967), *aff'd*, 396 F.2d 783 (4th Cir. 1968), *cert. denied*, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. ***Nardella v. Campbell Machine, Inc.***, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work she can perform after the injury. ***American Mutual Insurance Company of Boston v. Jones***, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266). Under this standard, an employee will be found to either have no loss of wage-earning capacity, no present loss but with a reasonable expectation of future loss (*de minimis*), a total loss, or a partial loss.

Once the claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. ***New Orleans (Gulfwide) Stevedores v. Turner***, 661 F.2d 1031 (5th Cir. 1981); ***Air America v. Director***, 597 F.2d 773 (1st Cir. 1979); ***American Stevedores, Inc. v. Salzano***, 538 F.2d 933 (2d Cir. 1976); ***Preziosi v. Controlled Industries***, 22 BRBS 468, 471 (1989); ***Elliott v. C & P Telephone Co.***, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, ***Shell v. Teledyne Movible Offshore, Inc.***, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, ***Trans-State Dredging v. Benefits Review Board***, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. ***Wilson v. Dravo Corporation***, 22 BRBS 463, 466 (1989); ***Royce v. Elrich Construction Company***, 17 BRBS 156 (1985).

The parties agree, and I find that the Claimant cannot return to work as a lasher (Tr, ALJ 1, ALJ 2, and Briefs of the parties). Therefore, the burden shifts to the Employer/Carrier to show suitable alternative employment.

Seven jobs approved by Dr. Glassman prior to 1999 are entered into the record (EX 8-EX 15). As these were approved two years prior to the actual date of maximum medical impairment, they are not current and are not relevant. The determination of the extent of the claimant's disability must be based on the claimant's vocational capabilities at the time of the hearing. ***Hayes v. P & M Crane Co.***, 23 BRBS 389 (1990), *vacated on other grounds*, 24 BRBS 116 (CRT) (5th Cir. 1991). As explained above, Dr. Glassman did not have the complete record, including any indication regarding the severity

of the mental impairment, at the time that he passed on these seven jobs. He approved them knowing that they may have been inappropriate (CX 4, 48). Moreover five of these jobs involve driving a motor vehicle the majority of the day and several involve dealing with significant record keeping and writing, which do not fit the Claimant's residual functional capacity and vocational skills. One of the jobs, a "door attendant" position is a job that may involve physically removing patrons from a lounge (EX 11). The job description omitted this requirement. The same is true for several of the others. According to the Claimant's testimony and Mr. Spruance, the Claimant is functionally illiterate. He scored in the bottom one percent of the population in reading, spelling and arithmetic on the Wide Range Achievement Test. (WRAT-3) (CX 20; Tr 162, 168). Claimant completed the WRAT-3 utilizing his left hand, which resulted in responses that were barely legible. (CX-20). William Gray, of W.J. Gray, Consulting, obtained similar scores to that of Mr. Spruance. The Claimant also must learn to write with the subdominant hand. Moreover, it is reasonable that driving involves activity, such as opening and closing car doors, that creates a risk of contact to the right hand that is extremely sensitive to touch. Some of the jobs, expose the hand and arm to the prospect of potential sensitivity. These jobs, approved by Dr. Glassman are:

Exhibit	***Employer***	***Job Title***
EX 16.	Vietnam Veterans	Trailer Attendant
EX 17.	Thrift Store	Customer Service Rep.
EX l8.	AMC Theaters	Usher
EX l9.	Yarbrough Security	Security
EX 20.	Target Cart	Attendant

Four of the five jobs approved by Dr. Glassman (EX 16-18, EX 20) were presented to Dr. Hussain for his review. He disproved them (Tr. 243; CX 6, 32-33, 44-45). The Claimant argues correctly that Dr. Glassman gives no indication that the claimant's condition has worsened since his release in 1997 and the impairment rating circa 1999 should be consistent with Dr. Glassman's earlier opinions rendered in 1995. Both the thrift store position and the cart attendant position may have required some lifting over 10 pounds, and would probably require bilateral hand manipulation. Both employers alleged that they would accommodate disabled. Dr. Glassman still approved these jobs as suitable for Mr. Townsend. Employer*s Exhibit EX 19, a security job, was never put before Dr. Hussain for approval or disapproval. The Claimant argues that this job description may be found at DOT, 372.667-034 indicates an exertional demand level of light duty for a security guard position. ***The Classification of Jobs Revised 1999*** indicates that reaching and handling are required on a frequent basis. The GED levels are Reasoning 3, Math I and Language 2. *See* DOT Vol. II, pgs. 1009-1011.

Claimant is correct that he cannot be expected to perform work requiring exertional levels which exceed his limitations and vocational requirements which exceed his skill level. If the Claimant's age, education and work history are to be evaluated, Dr. Glassman's opinion must be discounted as all jobs are actually beyond the Claimant's residual functional capacity as the nonexertional impairments, his education and literacy level do not match Dr. Glassman's assessment. Dr. Hussain did not agree with Dr. Glassman on any of the jobs, specifically rejecting all of them, except for the security guard position

(CX 6, 32-33, 44-45). Again I note that in a letter dated August 12, 1997, Dr. Glassman noted, "the list of jobs given indeed may not be fitting for him, however, I feel it is to seek some sort of employment to keep his mind active...." CX 4, 48. If jobs were not fitting for him in 1997, and no other evaluation has been performed by Dr. Glassman, it is reasonable that the same is true for jobs approved in 2000. I credit Dr. Hussain on his testimony regarding the jobs. Each of the jobs enumerated, require exertional activities beyond the Claimant's exertional capacity. I note also that the trailer job would expose the Claimant to heat, which can cause extreme pain (CX 6, 24).

From a physical standpoint, the security job description notes that sixty percent (60%) of the time would be devoted to standing and walking in that job. Although the security job can be sedentary if there is more sitting involved and the standing and walking is limited to occasional activity, there is no proof that such an accommodation was made in the case of the Yarborough Security job (EX 19). A review of the job duties that security jobs generally require, and comparing the the medical profile, shows that security jobs do not match the Claimant's established residual functional capacity and must be eliminated. As I find that the Claimant is functionally illiterate, at a minimum, he can not perform the writing and record keeping required by security jobs.

Dr. Hussain approved only three jobs:

1. Cashier (EX 2).[10]
2. Assembler of floor lamps (EX 3).[11]
3. Badge checker (EX 4).

Although Dr. Hussain approved some jobs for Claimant to try, Dr. Hussain* s deposition testimony makes it clear that he is skeptical about Claimant*s chances of success in finding and keeping a job on a regular and continuous basis. (CX 6., 34- 35, 57- 58).

EX 2 is an undated and unsigned Direct Labor Market Survey Report of a job described as "Cashier" with Central and Allright Parking in Jacksonville, Florida. The word "Approved" is circled at the bottom of the Exhibit and a check mark has been made under the heading, 'Physical Requirements". Claimant argues that the date this particular job was approved is important because the employer has stated its intention to cut off claimant*s benefits based upon the date of this job approval. "The employer has in fact, cut off claimant*s benefits since the hearing held in this matter" (CB footnote 1). Further, Claimant argues:

> Employer*s counsel will argue that Dr. Hussain acknowledged his approval of this job at his deposition. It is respectfully submitted that it is unclear from the deposition if Dr. Hussain is aware of the actual date the approval was made. (CX 6, 39).

Duties for the position include,

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[10] Central and All Right Parking.

[11] I Tech.

- Taking tickets,
- Calculating the amount of time and money owed,
- Taking money and making change.
- Completing paperwork of totals for the day and unusual transactions.

(EX 2).

According to the Claimant, the individual is required to take a reading, math and time test. (EX 2). The Dictionary of Occupational Titles, (hereinafter "DOT"), Vol. I & II, Fourth Edition, Revised 1991, # 211.462-010, describes the job as Cashier II. The strength requirement of the job Cashier II as it is outlined in the DOT is light duty and the General Educational Development (hereinafter "GED") levels are: Reasoning Level 3, Math Level 2 and Language Level 2 See DOT Vol.11, pgs. 1009-1011. The strength requirement of the job Cashier II as it is described in the DOT exceeds Claimant*s functional limitations as set out in the functional capacity evaluation. The GED levels for a Cashier II position all exceed Claimant*s vocational abilities, evidenced by his low IQ, functional illiteracy and other test scores. It is clear that Dr. Hussain only approved the job from a functional standpoint and based on the results of the functional capacity evaluation. (CX 6, 41-43). He deferred to others to determine the vocational viability of the job. (CX 6, 42-43).

Whether Dr. Hussain did reference the vocational impact or not, the job duties far exceed the Claimant's nonexertional restrictions. The Claimant can not be expected to use the left hand to perform the record keeping required. Moreover the Claimant is functionally illiterate. He has limited skills and can not be expected to make mathematical calculations. For all of those reasons, comparing the job duties to the Claimant's residual functional capacity, I find that this job does not constitute suitable alternative employment.

In any event, the Claimant exhibited a diligent effort to obtain the cashier job. (*See* CX 18, 1-4; Tr., 95). Claimant went to Central and Allright Parking, talked to a supervisor and filled out an application. Claimant was told that they were not hiring but he was given a card and told to check back. Claimant testified he did check back with the company. (Tr., 95).

EX 3 is an undated Direct Labor Market Survey Report of a job described as "Electronic Assembler" at I-Tech. Electronic assembler requires lifting up to 15 lbs.(EX 2) and according to Dr. Hussain, this lifting requirement exceeds Claimant*s limitations (CX 6, 41). According to the DOT, 726.684-0 18, the job Electronic Assembler has a light duty strength demand and it is a semi-skilled position (*see* CB). In addition I accept that as described the job requires more than "occasional" reaching and therefore is beyond the Claimant's medical profile. I accept that the electronic assembler is inappropriate and does not constitute suitable alternate employment.[12]

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[12] I also note that the Claimant made a diligent effort to obtain the job. (Tr. 95-97; C-18, 11-16). Claimant went out to the business indicated on the Survey Report and spoke with the General

Dr. Herbly was given two jobs that he approved. (EX 5 and EX 6). The jobs were not approved by Dr. Hussain. The Survey Report of the "Table Wiper" job does not define the reaching requirements. (EX 6). The DOT provides a job description for a job entitled Cafeteria Attendant/Table Attendant, DOT 311.677-010. The exertional demands of this job fall in the "light" category. Light work requires lifting to twenty pounds.[13] The job requires frequent reaching and handling. ***Classification of Jobs.*** *1992 Revision Pg. 1-48.* Therefore, as the Claimant is precluded from lifting beyond ten pounds and reaching more than "occasionally", this job exceeds the exertional limitations of Claimant as set out in the Functional Capacity Evaluation. (EX 6). Handling inmplies bilateral manual dexterity and the Claimant has only the use of the subdominant hand. I find that this job is contraindicated.

The other job before Dr. Herbly is the"appointment setter" position (EX 5). The job appears to be at a Marketing Company. The DOT defines this job as Appointment Clerk, DOT 237.367-0 10. The position is semi-skilled which eliminates it from consideration for Claimant. The GED levels are Reasoning Level 3, Math Level 2 and Language Level 3 *See* DOT, Vol. II, 1009-1011. Again, the vocational evidence shows that Claimant is functionally illiterate. This would generate a Language Level I on the scale in use by the Department of Labor. A review of the literature shows that any jobs that require use of Language at a level above 1 would not be appropriate for Claimant. I find that this job is not suitable alternative employment.

If I find, based on medical opinions, that the claimant cannot perform any employment, the employer has not established the existence of suitable alternate employment. ***Lostaunau v. Campbell Indus.,*** 13 BRBS 227 (1981), *rev'd on other grounds sub nom*. ***Director, OWCP v. Campbell Indus.,*** 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983), *overruled by* ***Director, OWCP v. Cargill***, 709 F.2d 616 (9th Cir. 1983). Given the Claimant's physical profile, the category of work presented is extremely small in Florida, limited to less than one tenth of one percent (0.1%) of the entire labor market (Id. 182). According to Mr. Spruance, it is "not unreasonable" that pain could further restrict that fund of jobs, and keep the Claimant from having adequate attendance and regularity (Id. 183).

Manger of the company, Ann Nguyen. Ms. Nguyen wrote on the job description that the position requires electronic experience or background. (CX 18, 12). When it was determined that Claimant does not have the experience or background necessary to perform the job Electronic Assembler, Claimant inquired about any other unskilled jobs they might have. (T-96). Claimant put in an application for a janitor/custodian job. (CX 14-16). To date, he has not been called for this position. The reliability of the information contained on all of these Direct Labor Market Survey Reports is called into question when the report of the Electronic Assembler job indicates the job has no experience or educational requirements and Claimant learns the job does require experience and education.

[13] It also involves postural movements that are beyond the Claimant's residual functional capacity. See 20 CFR 404.1567(b).

However, based upon the description of the badge checker position approved by Dr. Hussain, and the testimony of Mr. Spivey, North Florida Shipyards was ready to provide accommodation for the Claimant. According to the testimony, time would be provided to permit the Claimant to adapt to the new position. If Mr. Townsend fell asleep at his post, he would be accommodated (Tr., 198). Mr. Spivey testified that the duties were to man the back gate at the shipyards:

- Check the bags of the employees coming and going or anyone who wishes to enter the shipyard at the back gate. "If they don't have proper identification send them to my office."
- Physical duties require one to sit or stand in an air conditioned booth, and to match the badge with the face.
- If there were a problem, the employee would phone the main gate for further action.

Tr., 196-197. The hours were from twenty to forty per week, and the employee would be allowed to sit eighty nine percent (89%) of the time, stand ten percent (10%) and walk one percent (1%). No lifting was required. EX 4. He testified that the badge checker would:

> Observe what they were walking in and out with. If he felt it was company property, if it was company property, they would need a slip of paper saying they have permission to take that.

Id., 198.

The Claimant was offered the job. A single job *offer* may be sufficient to establish suitable alternative employment, including under the Board's standard. In ***Shiver v. United States Marine Corp, Marine Base Exch.***, 23 BRBS 246 (1990), the possible employer testified that it would accommodate the claimant until she was reacclimated to a work schedule, and two physicians stated that the job was suitable from a medical and psychiatric standpoint.

There is a dispute between the Claimant and Mr. Spivey as to the job duties were to be. The Claimant alleges the employee must walk a perimeter with a flashlight, and as part of the period to be worked would be after dark, he would have to carry a flashlight. Mr. Spivey denied this. At the time of the job interview, the Claimant was given a three page job description of a job entitled: Security Guard. (CX 18, 28-30). The job description for this job are similar to those discussed relative to Exhibit EX 19, above. If the job description is matched against the Claimant's residual functional capacity, the Claimant could not perform the physical work duties, and can not perform the clerical functions of the job as he is reduced to using the subdominant hand and is functionally illiterate.

During the course of testimony, Mr. Spruance was directed to the position designated as badge checker. In a discussion with the Claimant, Mr. Spruance was told that it was to be a night job that requires some checking around the premises using a flashlight (Id 180). According to the Claimant, the worker also inspects other employees clothes and work bags (Id 181). After Mr. Spruance presented the added duties to Dr. Hussain, he rejected the job (Id).

There is also a dispute whether the Claimant made a good faith attempt to work, discussed below. According to the testimony, several other people came to the same location, looking for jobs, but were

told in the Claimant's presence that no jobs were available (Tr., 107). The Claimant says that he was told that he'd have to stop employees to check bags and clothing to see whether company property was being taken (Id., 109). He also alleges that he would be required to walk a perimeter of the company with a flashlight to check for suspiciousness (Id., 113). He took the drug test to get the job. He was supposed to return at 8:30 a. m. the following morning. But on that morning, the Claimant alleges that he was too sick with the flu to report (Id., 113-114). He saw Dr. Hussain on that day (Id., 125;EX 24, 20-21).

Mr. Spivey advised that the job was offered, and the Claimant was to return the next day, May 1, 2001. On that date, a call was received from a person representing Mr. Townsend, who advised that the Claimant had a relapse. Mr. Spivey testified that the job was filled by May Third. The Claimant called on the tenth and was told at that time that the job had been filled (Tr., 199-201).

On cross examination, Mr. Spivey testified that the job in question was a security position, and is a "high turnover" position that doesn't pay well (Id., 204- 205). The written job description requires the employee to inspect the premises, patrol, and requires the completing of incident reports. He contended that he did not tell the Claimant that he would have to perform the duties enumerated in the written job description. Mr. Spivey admitted that prospective employees are given the job, but that they aren't able to maintain the position and can not do it. (Id., 214-215).

The Claimant concedes that job duties can vary from the written description and that employers can and will make accommodations for certain disabled employees. However, the Claimant argues that the job duties of the badge checker/back gate guard, as testified to by Mr. Spivey, are so minimal and pared down from the written job description of Security Guard that it does not seem to be a realistic job. CB. However, there is no mention on the Direct Labor Market Survey Report submitted to Dr. Hussain for his approval of the specific requirement testified to by Mr. Spivey of checking the bags of the employees coming and going. On cross-examination, Mr. Spivey denied he ever told Mr. Townsend he would have to physically look through bags. (Tr. 208).

Jerry Albert testified that the Claimant was capable of performing the job of badge checker, as well as all other jobs presented to the physicians. In addition, Mr. Albert testified that these jobs are only indicative of the type of jobs available in the marketplace in this general period of time. However, Mr. Albert also reported that the claimant had dozed in his presence, and if he were to do that when working, it would counter-indicate all work (Id., 246). When presented with the mental capacity form prepared by Dr. Wikstrom, he admitted that the Claimant would have a difficult time finding a job with the residual functional capacity presented (Id., 255). Based upon a complete evaluation, Mr. Spruance rendered an opinion that the Claimant will not be able to work in a competitive job market on a continuous basis (Id., 186). On cross examination, Mr. Spruance added that he had recommended that the Claimant enter a work hardening program (Id., 188). He also admitted that the labor market in Jacksonville is better that in most of the rest of the country (Id. 190). If an vocational expert is uncertain whether the positions which he identified are compatible with the claimant's physical and

mental capabilities, the expert's opinion cannot meet the employer's burden. ***Uglesich v. Stevedoring Servs. of America***, 24 BRBS 180 (1991); ***Davenport v. Daytona Marina & Boat Works***, 16 BRBS 196, 199-200 (1984). *See* ***Bostrom v. I.T.O. Corp.***, 11 BRBS 63, 65 n.2 (1979) (vocational rehabilitation specialist should test claimant's physical and intellectual capabilities before identifying specific, suitable jobs (dictum)). If a vocational rehabilitation counselor's evaluation relies on physicians whose opinions are discredited by the judge, and the counselor admits that the credited physician's opinions would preclude the claimant from working, the employer has not demonstrated suitable alternate employment. ***Dygert v. Mfr.'s Packaging Co.,*** 10 BRBS 1036 (1979).

Mr. Spivey testified that he has a high turnover rate in this particular job. He testified that he has placed 20 people in the job in the past two years (Tr., 204). He further testified, "I have gone long periods without having anyone back there because I couldn*t find anybody to come back and take the job." (Id., 205). At the time of the hearing, he testified he had people working all of the three shifts. Yet, the longest any of the three had stayed on the job was two months (Tr., 204). At the time of Mr. Spivey*s testimony at the hearing, one of the men had been on the job a week and the other had been working about a week (Id., 203).

The Claimant also argues that the gate guard security position is sheltered employment. Mr. Spivey testified that it is a position filled primarily by injured workers. (Tr. 203-204) There is a high turnover rate in the position. He testified, "I have gone long periods without having anyone back there because I couldn*t find anybody to come back and take the job." (Id., 205). In other words, there are long periods of time that the position is unfilled. The Claimant alleges that this shows that the position is not crucial to the running of the business (CB). He also argues that Mr. Spivey would go beyond accommodation (CB):

> When an employer makes accommodations in an employment setting, this typically means providing chairs to sit on if an individual can not stand long periods or providing ramps for wheelchair access. Mr. Spivey testified that he could tolerate an employee sleeping on the job for several weeks before he would have to get rid of him. (T. 212). This is more than an accommodation. This seems like a desperate attempt by an employer to create a job to use to bring injured workers back to work.

Id.

The majority of the cases discussing sheltered employment refer to jobs in the Employer*s facility. The badge checker/gate guard position is not at the Employer*s shipyard, but it is with a sister shipyard. In ***Diosdado v. Newpark Shipbuilding & Repair Inc.***. 31 BRBS 70 (1997), the Board remanded the case for further consideration of suitable alternate employment when the administrative law judge did not specifically consider whether the post-injury position claimant held with employer in its tool room was necessary and whether claimant was capable of performing it. The Claimant argues:

> Mr. Spivey*s direct testimony makes it clear that North Florida Shipyards can operate for long periods of time without anyone working in the Badge Checker/back gate guard position. How necessary to the running of a business can a position be that goes unfilled for long periods of

time?
CB.

Sheltered employment has been found where an employee would not necessarily be replaced if his job were terminated and where he was treated with "kid gloves," implying that his work was of little benefit to his employer and his wages were not justified by his service. ***Patterson v. Savannah Mach. & Shipyard***, 15 BRBS 38 (1982). An employee's part time work for employer, on an as-needed basis and with a mattress in the office for him to rest on, was found to be sheltered employment in ***CNA Insurance Co. v. Legrow***, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991). In ***CNA***, the record did not contain any evidence that the employee, in his brief stint as a security guard, was able to perform the job adequately.

A job specifically tailored to the employee's restrictions is not sheltered so long as it involves necessary work. ***Darden v. Newport News Shipbuilding & Dry Dock Co.***, 18 BRBS 224, 226 (1986). In the Eleventh Circuit, should a job be found to be sheltered employment, the extent of the employee's disability should be measured by his loss of wage- earning capacity rather than by his actual reduction in earnings. ***Argonaut Ins. Co. v. Patterson***, 846 F.2d 715, 21 BRBS 51 (CRT) (11th Cir. 1988), *aff'g in part and rev'g in part* 15 BRBS 38 (1982). Accordingly, in ***Argonaut,*** it was not error for the judge to award compensation for total disability despite the fact that the claimant was earning wages during the relevant period, since these wages were earned only by virtue of the employer's "benevolence."

Although this is a close issue, I accept that the job is not sheltered work. The Claimant had a duty to prove this issue, and failed to develop whether the job was unnecessary to the operation of the business. I note that the job is currently filled, and that the job has been in existence for several years.[14] Once the Employer/Carrier proved that the job constitutes suitable alternative employment, the Claimant must rebut, **Darden,** *supra*. I can not speculate concerning the Employer/Carrier benevolence, ***Argonaut***, *supra*.

I attribute great weight to Dr. Hussain's testimony with respect to his evaluation of the jobs. All of the jobs and all of the job duties were put to Dr. Hussain, and he had a more complete record before him than the other witnesses. He applied the Claimant's residual functional capacity, as a medical expert, to those job duties. He was given a complete rendition of the job duties. His testimony was subject to

[14] The Claimant says that he was told that he'd have to stop employees to check bags and clothing to see whether company property was being taken. He also alleges that he would be required to walk a perimeter of the company with a flashlight to check for suspiciousness. He took the drug test to get the job. Had this been proved, I would have found that there is no suitable alternative employment, and the issue regarding sheltered work would have been moot.

close cross examination. I accept that he had rejected all jobs except the badge checker position.[15] I give more weight to Mr. Spivey's description of the job than to that presented by the Claimant. Mr. Spivey described a job that would accommodate the Claimant's exertional and nonexertional impairments. I give little weight to the opinions of Mr. Albert about the nature of the other jobs that he had recommended, but I credit the testimony concerning accommodation. I do not attribute any weight to Mr. Robinson's report on this issue. I accept that Mr. Spruance reported inaccurate factors to Dr. Hussain, that were the basis for his rejection of the position. Neither party presented concrete proof to substantiate the allegations, but to a reasonable degree of probability, it is reasonable that Mr. Townsend is not accurate about the duties. I have discussed his deficiency in history and the fact that his some of his statements were impeached by prior inconsistent statements. The written job description as a security position is not dispositive in this instance. Even if the Claimant were correct that several other prospective employees were turned away in the Claimant's presence and that no other jobs were available, that does not mean that the badge checker job was not available at that time. And it does not imply that the duties are not as described by Mr. Spivey.

Based upon all of the evidence, I find that the *only* qualifying job identified in the record is the badge checker position. I find that this job as described, was within the Claimant's residual functional capacity. I find that the job does not involve record keeping, patrol or searching employees. I find that the Claimant was made a bona fide offer of that job, ***Shiver,*** *supra*. I also find that the job was not sheltered work, as others have held the job, and it is currently filled. Therefore the Employer/Carrier has met its burden to establish suitable alternative employment.

Diligent Attempt to Work

The Employer/Carrier argues that the Claimant has failed to make an effort to work. The Claimant testified that when he called back to speak to Mr. Spivey, he was told that the position had been filled. If the employer has established suitable alternate employment, the employee can nevertheless prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure employment. The burden then shifts to Claimant to show opportunities shown by Employer to be reasonably attainable and available and must establish a willingness to work. **Turner**, supra; see also ***Palumbo v. Director, OWCP***, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991). If a claimant demonstrates he diligently tried and was unable to obtain a job identified by the employer, he may prevail. ***Roger's Terminal & Shipping Co. v. Director, OWCP***, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986). Finally, the claimant must reasonably cooperate with the employer's rehabilitation specialist and submit to rehabilitation evaluations. ***Vogle v. Sealand Terminal***, 17 BRBS 126, 128 (1985).

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[15] At one point, he had rejected that job, but it was based on the idea that it requires some checking around the premises using a flashlight (Id 180). According to the Claimant, the worker also inspects other employees clothes and work bags (Id 181). When Mr. Spruance presented the duties to Dr. Hussain, the job was rejected (Id).

Claimant, with the help of his girlfriend, filled out the application paperwork and then had an interview with Mr. Spivey (EX 22). Claimant was offered the Badge Checker/back gate security job and he accepted it on April 30, 2001. (Tr., 114). Claimant was due to have a physical the following day, Tuesday, May 1. Claimant had been in the Emergency Room the previous weekend with the flu. (CX 22, 2). The Claimant alleged that he did not feel well when he went to North Florida Shipyards to apply for the job but he went anyway. When he woke up Tuesday morning, May 1, he was feeling ill and he asked his girlfriend to call North Florida Shipyards and let them know he could not make it for the physical that morning. (Id., 114-115). Mr. Spivey acknowledged receipt of the call. (Id., 201). There is no evidence Claimant was declining the job or that he his illness would not be excused. Claimant had a doctor*s appointment with Dr. Hussain the afternoon of Tuesday, May 1, 2001. (CX 22). At that office visit, he told Dr. Hussain he had been in the Emergency Room at Shand*s Hospital on April 27, 2001 with severe flu (EX 24, 18-20). He was feeling better the next day, Wednesday, May 2, 2001 and he first called and then went out to North Florida Shipyards to see if he could reschedule the physical. When he called on Wednesday, May 2, 2001, he spoke with a woman who indicated they were trying to get an appointment for him. (Tr., 115) When he went to North Florida Shipyards later that afternoon, after a doctors appointment with Dr. Wikstrom, he was told by a woman that the shift was filled. (Id.,116) He followed up the next week and was told the same thing, the position was filled. Mr. Spivey testified that "We did not hear from Mr. Townsend again until the 10th of May." (Id., 201) The Claimant argues that this testimony is not inconsistent with his testimony. Claimant never said he spoke directly to Mr. Spivey on Wednesday, May 2, 2001. Rather, all of his conversations were with a *woman* at North Florida Shipyards. Claimant argues that he is ready and willing to try the Badge Checker position (CB). Mr. Spivey testified that he told Claimant on May 10, 2001 that he would keep his application on file (Tr., 201).

I accept that Claimant made an acceptable attempt to try the badge checker position. He was offered the job and he accepted it. Given his physical condition, it is reasonable that he was ill on Tuesday morning, May 1, 2001. Sickness is a valid reason for not appearing at that time. Whether the girlfriend called to say he could not make it that morning is not disputed by Mr. Spivey. In fact Mr. Spivey reported that the Claimant's girlfriend had related that he had a relapse of pain (Id., 201). It is foreseeable that people who have been injured and who have a permanent impairment may have medical difficulties from time to time. Mr. Spivey testified that he has a high turnover rate in this particular job. He testified that he has placed 20 people in the job in the past two years. (Tr., 204). It is reasonable to expect that the Claimant's girlfriend placed Mr. Spivey on inquiry notice that the Claimant had a medical problem the morning in question. If Mr. Spivey would tolerate sleeping on the job by an employee, it is inconsistent to fail to consider excusing a day's absence due to a medical problem.

I accept that some of Mr. Spivey's other statements lead one to believe that there was an assumption made that the Claimant would not accept the job. Mr. Spivey also admitted, "I have gone long periods without having anyone back there because I couldn't find anybody to come back and take the job."

(Id., 205). At the time of the hearing, he testified he had people working all of the three shifts.[16]

I also note that Mr. Albert made an allegation that the Claimant limited his job search at the time Mr. Albert was handling his case for the Employer/Carrier. Mr. Albert had referred the Claimant to a trailer attendant or customer service worker position at a Vietnam Veterans Association facility. The employer reportedly needed someone to work on weekends, and Mr. Albert alleged that the Claimant did not follow up (Id., 227). The Claimant advises that he did not want to work on Sunday as he is an active church member and will not work on the sabbath. Mr. Albert wanted to take the Claimant to Target Stores at that time, but the Claimant advised that he was told that he was to attend only one job placement session. The Claimant testified that after he applied for a job at Central and All Right Parking, he checked back, as he did on all the jobs he applied for. He was sent to I-Tech, but when he got there, he found that it was a skilled job, although it was supposed to be an assembly position, he wound up applying for a janitor's job, which is beyond his residual functional capacity. He also applied at Goodwill, but none of the jobs were appropriate for him (Id., 95-100). Mr. Albert took him to Goodwill and the Salvation Army, on a very hot day. Although he applied there also, he claims that never heard from them after the application was filed. He was also sent to Target, and to a strip bar by the Employer to apply as a bouncer and ticket taker. "[T]he people looked at me like I was crazy...." Id., 102-104. The Claimant stated that he is still looking for work, and will attend a job fair that Goodwill is sponsoring (Id., 100). He said that he is willing to try to work, but "most people don't want you working around nobody if you don't have your health." Id., 121.

I accept that the Claimant operated on advice of counsel when he told Mr. Albert that his search was limited at that time of the interview at the trailer. I also accept that the Claimant exhibited a diligent effort to obtain the cashier job. (*See* CX 18, 1-4; Tr., 95). Claimant went to Central and Allright Parking, talked to a supervisor and filled out an application. Claimant was told that they were not hiring but he was given a card and told to check back. Claimant testified he did check back with the company. (Tr., 95). I also note that the Claimant reported to Mr. Spruance that he had unsuccessfully looked for work at a theater, picking oranges, at a supermarket, at several fast food restaurants and at a hardware chain (Id 170-172). I accept that this is accurate. I also accept that it is difficult for him to obtain work as his impairment may indeed be an impediment to hiring. I find that remainder of the jobs recommended by Mr. Albert were inappropriate. Given the nonexertional overlay, this may have caused confusion to the Claimant. Later, Mr. Albert referred Mr. Townsend to Mr. Spivey at North Florida Shipyards (Id., 229). I find that Mr. Townsend was compliant with Mr. Albert.

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[16] Counsel alleges that the Claimant has called North Florida Shipyards since the hearing held in this matter, inquiring about an opening. He continues to be told there are no openings (CB). This is not of record as testimony has not been given and is not considered. However, I note that Mr. Spivey testified that he told Claimant on May 10, 2001 that he would keep his application on file (Tr., 201).

I accept the documentation showing that the Claimant had been sick before, during and after he had the appointment with North Florida Shipyards and with Mr.Spivey. The record shows that he had the flu, was in pain and had tried to contact Mr. Spivey. There is no evidence Claimant was declining the job or that he his illness would not be excused. Claimant had a doctor*s appointment with Dr. Hussain the afternoon of Tuesday, May 1, 2001. (CX 22). At that office visit, he told Dr. Hussain he had been in the Emergency Room at Shand*s Hospital on April 27, 2001 with severe flu (EX 24, 18-20). He was feeling better the next day, Wednesday, May 2, 2001 and he first called and then went out to North Florida Shipyards to determine whether he could reschedule the physical. Mr. Spivey testified that the job was filled by May Third. (Id., 199-201). I accept that Mr. Townsend's story is substantiated in part by Mr. Spivey had been placed on notice that he was ill shortly before the job was filled (Id., 201).

I find that the Claimant diligently tried and was unable to obtain suitable alternative employment identified by the employer. ***Turner***, *supra*.

Average Weekly Wage and Compensation Rate

The parties have stipulated to the average weekly wage (Tr., 37; ALJ 1; ALJ 2). That amount is $273.57. Mr. Townsend is entitled to the minimum compensation rate pursuant to 33 U.S.C. §§6(b)(3) of the Act under which the Secretary determines the national average weekly wage to be applicable for each 12-month period beginning October 1 of each year ("Maximum and Minimum Compensation Rates").[17] Under Section 906(b)(2) of the Act[18], Claimant's compensation for a total disability cannot be less than 50% of the national average weekly wage . The minimum compensation rate was payable to this Claimant because two thirds of Claimant's stipulated average weekly wage of $273.57, or $182.38 per week, which would otherwise have been the rate of compensation payable, is

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[17] 33U.S.C. 906 (b)(2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 10 are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

33U.S.C. 906 (b)(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after the enactment of this subsection.

[18] 33 U.S.C. 906(b)(2).

less than the minimum compensation rate applicable to the period, $184.58.[19] This compensation rate is subject to appropriate annual adjustment over time in accordance with the applicable schedule of Maximum and Minimum Compensation Rates under the Longshore Act.

Viagra

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require. 33 U.S.C. §§ 907(a).

Prozac has a high risk for creating sexual dysfunction (EX 22, 6). There is no dispute that Prozac is authorized. Dr. Herbly testified that in his opinion, Viagra was reasonable and necessary to counter the side effect (EX 22, 11). In January, 2000, Dr. Herbly prescribed Viagra (CX 8, 4-11).

The Employer initially authorized Viagra (CX 15), but subsequently withdrew it*s authorization. Dr. Herbly testified that the Claimant had a repeated pattern of asking him for Viagra prescriptions, which was even more than one a day. He also had doubts as to whether or not the Claimant was taking Prozac, as blood tests failed to show evidence of the drug in the Claimant's system. Dr. Herbly testified that he gave the Claimant 30 Viagra pills and after 10 minutes, the Claimant called wanting a refill. Dr. Herbly testified that his concerns developed over a period of time. (EX 22, 15, 16, 17, 25, 30, 36, 37). Dr. Wikstrom has continued the prescriptions of Prozac and Viagra. (CX 19).

Employer/Carrier's adjuster inquired whether the prescribed medication was work related. In the letter, he asked whether Viagra was needed to return the Claimant to work capacity. I find that this is not the standard, which is set forth below. I find that Dr. Herbly acquiesced to this standard. *See* CX 13-15.

I have questioned Dr. Herbly's credibility above. I determined that it is reasonable that Dr. Herbly is an ally of the Employer/Carrier.[20] Allegations of abuse did not arise until the adjuster questioned authorization. I find that Dr. Herbly compromised his position as the Claimant's treating psychiatrist. I find that the Viagra issue is a pretext to conflict this Claimant's case for benefits. The allegation regarding the excessive requests for refills is not well documented. As long as the expense is both reasonable and necessary, it must be provided. ***Parnell v. Capitol Hill Masonry***, 11 BRBS 532, 539(1979). An employer is liable for medical services for all legitimate consequences of the compensable injury, including the chosen physician's unskillfulness or errors of judgment. ***Lindsay v. George Wash. Univ.***, 279 F.2d 819 (D.C. Cir. 1960); *see also* ***Austin v. Johns-Manville Sales***

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[19] See Department of Labor table: http://www.dol.gov/dol/esa/public/contacts/owcp/ny/chart2.htm.

[20] See discussion at pp.25-26.

Corp., 508 F. Supp. 313 (D.C. Me. 1981). I note that Dr. Wickstrom is now an authorized source and has prescribed Viagra.

I find that the sexual dysfunction is a legitimate consequence of the compensable injury and treatment. I find that the Claimant is entitled to the Viagra. If the Claimant abuses it in the future, this matter can be addressed prospectively.

Scheduled Injury

Claimant made a request in the alternative to the permanent and total disability argument "to point out the error made by the Employer in simply assessing Claimant*s impairment based on a literal book interpretation of his permanent injury" (CB). As I find that the Claimant is entitled to permanent total disability, this issue is moot.

An award under the schedule of the Act is not compatible and may not coincide with an award for permanent total disability because it presupposes the loss of all wage-earning capacity. ***Turney v. Bethlehem Steel Corp***., 17 BRBS 232, 235, ftn 5. (1985); ***Frye v. Potomac Electric Power Co***., 21 BRBS 194, 198 n.2 (1988). Since the principle of compensation under the Act is generally to provide for an award to compensate for loss of earning capacity, it has been recognized that a claimant cannot be more than totally disabled or receive compensation which exceeds that payable to the claimant in the event of total disability. ***Turney***, supra; ***ITO Corp. of Baltimore v. Green***, 185 F.3d 239, 243 (4th Cir. 1999). It would be inconsistent with the wage-earning capacity principle to allow an award for scheduled permanent partial disability to co-exist with temporary total disability. ***Davenport v. Apex Decorating Co.***, Inc., 18 BRBS 194, 197 (1986).

As Claimant is permanently totally disabled, I conclude that the Claimant is not entitled to a separate schedule award.

Disfigurement

33 U.S.C. §908 (20) Disfigurement sets forth:

> Proper and equitable compensation not to exceed $ 7,500 shall be awarded for serious disfigurement of the face, head, or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment.

The Employer/Carrier argues that there is no evidence to support a separate award for disfigurement under the Act, as there is no evidence that the appearance of the Claimant's hand injury was any greater deterrent to the Claimant's ability to return to work than encompassed in the scheduled award for permanent partial disability.

While Section 8(c)(20) of the Act provides a special schedule category for disfigurement, the Board has held that a scheduled award may not coincide with an award for permanent total disability under the LHWC Act. ***Conde v. Interocean Stevedoring, Inc.***, 11 BRBS 850 (1980); see also ***Arnold Eggebrecht v. Leicht Material Handling Co.***, 16 BRBS 191 (1984). Such jurisprudence is

founded in the Ninth Circuit Court of Appeals case ***Rupert v. Todd Shipyards Corp***., 239 F.2d 273 (9th Cir. 1956), which reasoned,

> As a compensation statute imposing upon the employer liability regardless of fault, the Act should generally be interpreted as providing for an award intended to compensate for loss of earning capacity. Any interpretation permitting an award of compensation for facial disfigurement to be super-imposed upon an award for 'permanent total disability' which presupposes a permanent loss of all earning capacity, would run counter to the manifest spirit and purpose of the enactment. ***Rupert v. Todd Shipyards Corp.***, 239 F.2d 273, 276-77.

As Claimant is permanently totally disabled, I conclude that the Claimant is not entitled to a separate schedule award for disfigurement. ***Fuduli v. Maresca Boat Yard, Inc.***, 7 BRBS 982, 986-87 (1978).

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. ***Avallone v. Todd Shipyards Corp***., 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. ***Watkins v. Newport News Shipbuilding & Dry Dock Co.***, 8 BRBS 556 (1978), **aff'd in pertinent part** and *rev'd on other grounds sub nom*. ***Newport News v. Director, OWCP***, 594 F.2d 986 (4th Cir. 1979); ***Santos v. General Dynamics Corp***., 22 BRBS 226 (1989); ***Adams v. Newport News* Shipbuilding**, 22 BRBS 78 (1989); ***Smith v. Ingalls Shipbuilding***, 22 BRBS 26, 50 (1989); ***Caudill v. Sea Tac Alaska Shipbuilding***, 22 BRBS 10 (1988); ***Perry v. Carolina Shipping***, 20 BRBS 90 (1987); ***Hoey v. General Dynamics Corp***., 17BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that "... the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills ...." ***Grant v. Portland Stevedoring Company***, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer, **Stevens Shipping and Terminal** shall pay the Claimant, **Joseph Townsend**, temporary total disability based upon an average weekly wage of $273.57, at the

minimum compensation rate as set forth by 33 U.S.C. §906, from June 24, 1994 to July 14, 1999 .

2. The Employer shall pay the Claimant permanent total disability benefits from July 14, 1999 to the present at the minimum compensation rate in accordance with the provisions of Section 906 (b)(2) and (3) and Section 8(a) of the Act. 33 U.S.C §§ 906(b) and 908(a).

3. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant for the same time periods specified above as a result of his June 24, 1994 injury.

4. The Employer shall continue to furnish the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, subject to the provisions of section 7 of the Act.

5. The Employer shall provide the Claimant Viagra.

6. As I award the Claimant permanent total disability, the request for scheduled injuries is denied.

7. As the Claimant is entitled to permanent total disability, the request for an award based on disfigurement is denied.

8. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §§1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

9. Jurisdiction is reserved to entertain an attorney's fee petition. Claimant's attorney shall submit, within twenty (20) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to appropriate Respondents' counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred for those time periods specifically enumerated above.

A
Daniel F. Solomon
Administrative Law Judge